

No. 12105

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
VS.

APEX FISH COMPANY, a corporation,
Appellee.

Apostles on Appeal

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED
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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

Proctors for Appellant:

MR. J. CHARLES DENNIS,
United States Attorney,
1017 U. S. Court House,
Seattle 4, Washington.

MR. CLAUDE E. WAKEFIELD of
MESSRS. BOGLE, BOGLE & GATES,
Central Building,
Seattle 4, Washington.

Proctors for Appellee:

EDWARD M. HAY and
DAVID O. HAMLIN,
564 Colman Building,
Seattle 4, Washington. [1]

In the District Court of the United States for the
Western District of Washington, Northern Division

In Admiralty No. 15091

APEX FISH COMPANY, a Corporation,
Libelant,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

LIBEL

To the Honorable Judges of the Above-Entitled
Court:

The libel of the above-named libelant against the
United States of America in a cause of cargo loss
and damage, civil and maritime, alleges as follows:

I.

That at all times hereinafter mentioned Apex
Fish Company was and now is a corporation organized and existing under and by virtue of the laws of the state of Washington having its principal office and place of business at Seattle, King County, Washington, within the above judicial district and has paid all license fees.

II.

That Lee H. Wakefield and Laverne E. Wakefield are residents of Seattle, King County, Washington, and at all times since January 13, 1947, have been and now are the duly designated, elected and qualified trustees of said corporation and of all

of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

III.

That at all times herein mentioned the respondent, the United States of America, was and still is a sovereign power which has by law consented to be sued herein. [2]

IV.

That at all times herein mentioned the respondent, the United States of America, was and now is the owner and operator of the steamship Denali and was the carrier of the cargo hereinafter mentioned.

V.

That at all times hereinafter mentioned said vessel was either a public vessel of the United States of America or employed by the respondent as a merchant vessel and in either event was operated by or on behalf of the respondent as a common carrier of merchandise for hire.

VI.

That if said vessel were privately owned or possessed, a proceeding in admiralty in rem and in personam could now be maintained against said vessel and against her owner by libelant for the loss and damage hereinafter alleged and libelant hereby elects to proceed upon the principles of both a libel in personam and a libel in rem.

VII.

That the steamship Denali will at the time of the filing of this libel be within this district and within the jurisdiction of this Honorable Court.

VIII.

That on August 23, 1946, the said libelant delivered to the respondent at the port of Port Wakefield, Alaska, certain merchandise in good order and condition, to-wit, 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1,129 half barrels of medium salt herring to be carried from said port of shipment to the port of Seattle, Washington, and there to be delivered in like good order and [3] condition as when shipped to the order of James Farrell and Co. in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the warship short lading Form, then and there signed and delivered to said shipper by the duly authorized agent or representative of the respondent.

IX.

That thereafter respondent loaded all the aforesaid merchandise aboard the steamship Denali and the vessel having on board said merchandise, sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington, still having the said merchandise aboard, but not in like good order and condition as when delivered to respondent, but completely damaged, destroyed and rendered wholly unfit for any use whatsoever.

X.

That at all times herein mentioned libelant was the sole owner of said merchandise and the sole owner of the right to sue and recover for the damage thereto.

XI.

That by reason of respondent's failure to deliver said merchandise in good order and condition as received, libelant has been damaged in the sum of \$19,321.89, being the reasonable value of said merchandise at the time of delivery to respondent and at the time of respondent's said failure to deliver in good order and condition.

XII.

That the libelant has fully performed all of the terms and conditions of said contract of carriage by it to be done or performed. [4]

XIII.

That this suit is brought under the Act of March 9, 1920, known as the Suits in Admiralty Act and also chapter 95, 41 Statutes at Large 525, 46 U.S.C., Sections 741 to 752, inclusive, and also pursuant to and by virtue of authority given in the Suits in Admiralty (Public Vessels) Act of March 5, 1925, chapter 428, 43 Statutes at Large 1112, 46 U.S.C., Sections 781 to 790, inclusive.

XIV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore libelant prays that upon service of a copy of this libel upon the United States Attorney for the Western District of Washington, Northern Division, and upon the mailing of a copy thereof by registered mail to the Attorney General of the United States and the filing of a sworn return of

such service and mailing in accordance with title 46, United States Code, Section 742, respondent be ordered to appear and answer upon oath all and singular are matters aforesaid and that this Honorable Court will be pleased to decree payment from the respondent to the libelant of the damages aforesaid with interest and costs and that libelant have such other, further or different relief as to the court may seem meet, proper and just in the premises and as in law and justice it may be entitled to receive.

s/ EDWARD M. HAY and

/s/ DAVID O. HAMLIN,

Proctors for Libelant. [5]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed July 29, 1947. [6]

[Title of District Court and Cause.]

ANSWER TO LIBEL AND
INTERROGATORIES

To the Honorable Judges of the Above-Entitled Court:

The Answer of the respondent, The United States of America, to the Libel herein admits, denies and alleges as follows:

I.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph I and therefore denies the same.

II.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph II and therefore denies the same.

III.

Respondent admits the allegations of Paragraph III.

IV.

Respondent admits the allegations of Paragraph IV.

V.

Respondent admits the allegations of Paragraph V.

VI.

Respondent denies the allegations of Paragraph VI.

VII.

Respondent denies the allegations of Paragraph VII. [7]

VIII.

Respondent admits that on or about August 23, 1946, the cargo alleged in Paragraph VIII of the Libel, to-wit: 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1129 half barrels of medium salt herring was loaded on board the SS "Denali" for carriage to Seattle, Washington, pursuant to the valid terms of bill of lading issued by the Respondent and Respondent denies each and every other allegation contained in said Paragraph VII and particularly denies that said

cargo, at the time of delivery to and loading upon the said vessel, was in good order and condition.

IX.

Respondent admits that said cargo as loaded on board the SS "Denali" arrived at the Port of Seattle and was delivered to the libelant and/or consignee but denies that the same or any part thereof was not in like good order and condition as when delivered to Respondent and denies that the same was completely damaged or destroyed in any respect whatsoever as a result of the carriage of said cargo or any fault or liability of the Respondent or the said vessel, its officers or crew, or at all.

X.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph X and therefore denies the same.

XI.

Respondent denies that libelant has been damaged in the sum of \$19,321.89 or any other sum whatsoever and denies that it failed to deliver said cargo in as good order and condition as when received by the Respondent and the vessel. [8]

XII.

Respondent denies the allegations of Paragraph XII.

XIII.

Respondent admits the allegations of Paragraph XIII.

XIV.

Respondent admits the admiralty jurisdiction but denies that the premises are true.

Further Answering and by Way of First Affirmative Defense, Respondent Alleges:

I.

That the shipment of cargo referred to in the Libel was carried by the Respondent, United States of America, pursuant to the valid terms and conditions of a bill of lading issued by the Respondent and delivered to the Libelant, which said bill of lading was on the regular form of Warship-lading, 7142 for July 1, 1942 (Sec. 303.11, Title 46, CFR, Cum. Supp. 11,336) of the United States War Shipping Administration and incorporated therein the provisions of the Carriage of Goods By Sea Act (46 U.S.C.A. 1300 et seq.) which said bill of lading and the said statutes governed the undertaking of the parties hereto with respect to the carriage of all of said cargo; that the Libelant is now and at all times material herein has been in possession of the originals or exact copies of said bill of lading governing the shipment herein described.

II.

That the said bill of lading issued for the shipment referred to in the Libel contained among others the following provision: [9]

“This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States of America approved April 16, 1936, which shall be deemed

to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (unless or except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier * * *

III.

That due diligence was exercised to make said vessel seaworthy and properly manned, equipped and supplied at the beginning of the voyage; that any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the said vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was the result of inherent defect, quality or vice of the goods as shipped aboard the vessel, one of the causes excepted in the bill of lading hereinabove referred to and excepted in the Carriage of Goods by Sea Act hereinabove referred to and that if any of said damage was the result of negligence of the officers or crew or other agents of the Respondent or of the vessel such negligence consisted of faults or errors in navigation or in the management of the vessel for which the Respondent and the vessel are excused from lia-

bility pursuant to the applicable provisions of the said Carriage of Goods by Sea Act.

Further Answering and by Way of Second Affirmative Defense, Respondent Alleges: [10]

I.

Respondent re-alleges Paragraphs I and II of the First Affirmative Defense and by this reference incorporates the same fully herein.

II.

That any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was solely the result of one of the causes excepted to in the bill of lading hereinabove referred to excepted to in the Carriage of Goods By Sea Act hereinabove referred to, to-wit, was the result of a strike and stoppage of work by the Maritime Unions at the Port of Seattle and other ports on Puget Sound, which said strike prevented the unloading of the said vessel and of libellant's cargo from said vessel until on and after September 25, 1946, for which delay the Respondent is not liable and that if any of said damage was the result of any negligence of any officers or crew or other agents of the Respondent or of the vessel such negligence consisted in faults or errors in navigation or in the management of the vessel for which the Respondent and the said vessel are excused from liability pursuant to the applicable provisions of the said Carriage of Goods By Sea Act.

Wherefore, Respondent prays that the Libel herein be dismissed and that Libelant take nothing thereby and that Respondent have and recover costs and for such other and further relief as to the court may seem just in the premises.

/s/ J. CHARLES DENNIS,
United States Attorney, Proctor for Respondent,
United States of America. [11]

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 28, 1947. [12]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY
RESPONDENT TO THE LIBELANT

Comes now the Respondent and herewith propounds to the Libelant the following Interrogatories to be answered in writing and under oath as required by the rules and practice of this court, to-wit:

Interrogatory No. 1: Please state categorically the dates upon which the various barrels of herring referred to in the Libel were packed and processed and ready for shipment and the number of barrels so processed on each date.

Interrogatory No. 2: With reference to Interrogatory No. 1, state the dates the fish which went

into said barrels was delivered to the cannery at Port Wakefield.

Interrogatory No. 3: Describe in detail the process of preparing and packing the barrels of salt herring.

Interrogatory No. 4: State what records are kept showing receipt of fish at the cannery and the processing of such fish by the cannery into the completed barrel ready for shipment.

Interrogatory No. 5: After the barrels of salt herring referred to in Interrogatory No. 1 had been processed and completed for shipment state where they were kept or store and under what conditions until the time they were shipped on the "Denali." [13]

Interrogatory No. 6: If the barrels were kept or stored on the open dock before loading state how many were so stored and for how long they were so stored and whether they were covered with tarpaulins or otherwise covered or protected.

Interrogatory No. 7: If barrels were kept or stored in a warehouse or covered space before loading state how many were so stored and for how long and what care or protection was afforded the barrels during that time.

Interrogatory No. 8: State the maximum covered storage facilities at the cannery at Port Wakefield and whether said storage facilities were completely filled at the time the "Denali" loaded there on August 23, 1946.

Interrogatory No. 9: When was the peak of the season in 1946 with reference to receipt of the largest quantity of fish at the cannery?

Interrogatory No. 10: State from your experience what is the maximum temperature to which barrels of salt herring can be subjected before becoming damaged by such temperature.

Interrogatory No. 11: At what temperature should barrels of salt herring be kept when stored to remain in sound and undamaged condition.

Interrogatory No. 12: For how long would a barrel of salt herring have to be subjected to the temperature mentioned in Interrogatory No. 11 to become damaged.

Interrogatory No. 13: In connection with packing or processing salt herring, state how long the completed product is supposed to remain sound after being packed and under what specific conditions.

Interrogatory No. 14: Does the shipment of salt herring from Alaska to Seattle require cold storage or cool room stowage [14] or is it desirable or requested?

Interrogatory No. 15: Is salt herring shipped from Seattle to New York or other East Coast cities and if so how is it shipped (by rail or boat) and is it afforded refrigeration during such shipment?

Interrogatory No. 16: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage.

Interrogatory No. 17: State the maximum daily temperatures at Port Wakefield, Alaska, between August 1, 1946, and August 24, 1946, and state whether on each day it was clear, cloudy or rainy.

Interrogatory No. 18: States the invoice value per barrel at Port Wakefield on August 23, 1946, of the following: 1 quarter barrels salt herring, medium; 1 half barrel salt herring, large; and 1 half barrel salt herring, medium;

Interrogatory No. 19: Give the same information as in the foregoing Interrogatory with respect to the landed value of such barrels at Seattle, Washington, in September, 1946.

Interrogatory No. 20: For what price and on what terms were barrels of such salt herring sold in Seattle during September, 1946?

Interrogatory No. 21: Please set forth a computation in detail of the damages to the shipment in question which is alleged in the Libel to be \$19,321.89.

/s/ J. CHARLES DENNIS,

United States Attorney, Proctor for Respondent,
United States of America. [15]

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 28, 1947. [16]

[Title of District Court and Cause.]

ORDER ON LIBELANT'S EXCEPTIONS TO
RESPONDENT'S INTERROGATORIES

The above-entitled cause having come on regularly for hearing before the undersigned Judge of said Court on January 12, 1948, on the libelant's exceptions to respondent's interrogatories, libelant appearing by its proctor, David O. Hamlin, respondent appearing by its proctor, Claude Wakefield, the libelant having moved the court for an order sustaining its exceptions, the court having heard the argument of proctors for the respective parties, having considered the records and files herein, the authorities submitted by the parties, and having heretofore orally announced its decision and being now fully advised, it is by the court

Ordered that libelant's exceptions to respondent's interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, and 21 be and the same are hereby overruled; and it is further

Ordered that libelant's exceptions to interrogatories numbered 10, 11, 12, 15, 16, 17, 18, 19 and 20 be and the same are hereby sustained.

Done in Open Court this 19th day of January, 1948.

JOHN C. BOWEN,
District Judge.

[Endorsed]: Filed Jan. 19, 1948. [17]

[Title of District Court and Cause.]

LIBELANT'S ANSWER TO RESPONDENT'S
INTERROGATORIES

Comes Now the libelant and answers the interrogatories of the respondent as required by the rules and practice of this court, save and except those to which exceptions have heretofore been sustained by said court.

Interrogatory No. 1: Please state categorically the dates upon which the various barrels of herring referred to in the Libel were packed and processed and ready for shipment and the number of barrels so processed on each date.

Answer: Packing of the various barrels of herring referred to in the Libel was commenced on the following dates, the number of half barrels commenced on each day being as indicated:

Date	No. of Half Barrels
July 24, 1946.....	225
July 25, 1946.....	102
July 26, 1946.....	100
July 27, 1946.....	74
July 31, 1946.....	78
August 1, 1946.....	24
August 3, 1946.....	252
August 4, 1946.....	29
August 5, 1946.....	23
August 6, 1946.....	155
August 7, 1946.....	125
August 8, 1946.....	43

Date	No. of Half Barrels
August 9, 1946.....	278
August 10, 1946.....	53
	<hr/>
	1,561

In general processing of each lot so started was completed and the herring ready for shipment ten days after the date of commencement. Attention is directed to the shrinkage factor noted in libellant's answer to interrogatory No. 3 for explanation of the difference between the total number of half barrels packed and the number shipped.

Interrogatory No. 2: With reference to Interrogatory No. 1, state the dates the fish which went into said barrels was delivered to the cannery at Port Wakefield.

Answer: The fish referred to in interrogatory No. 1 went into said barrels on the same day they were delivered to the cannery at Port Wakefield by the fishermen.

Interrogatory No. 3: Describe in detail the process of preparing and packing the barrels of salt herring.

Answer: The fish pass directly from the boat through a sorting device to a work table where they are gibbed, an operation consisting of removal of the pectoral fins, gills and entrails. The gibber grades the fish as to size after which they are salted. The fish are then packed in layers in a half barrel receiving more salt in this operation. When the half barrel is completely full it is headed, placed on

its side and a bung-hole drilled half way between the top and the bottom. Approximately a half gallon of brine is poured into the barrel through this opening, a bung inserted and the barrel stored in the plant for eight or ten days to cure. After curing the barrels are opened and the herring "re-packed." This operation is required because the fish shrink roughly twenty per cent in bulk during the process of curing. The fish are removed from sufficient of the [19] curing barrels and distributed as required to completely fill the remainder. The barrels are again headed, completing the processing.

Interrogatory No. 4: State what records are kept showing receipt of fish at the cannery and the processing of such fish by the cannery into the completed barrel ready for shipment.

Answer: Records are kept each day of each boat delivering fish to the cannery, the amount delivered and the area from which the fish were taken. Records are likewise kept as to the number of barrels processed each day and the date of the original pack is marked on the bottom of the barrel.

Interrogatory No. 5: After the barrels of salt herring referred to in Interrogatory No. 1 had been processed and completed for shipment state where they were kept or stored and under what conditions until the time they were shipped on the "Denali."

Answer: After the barrels of salt herring referred to in Interrogatory No. 1 had been processed and completed for shipment they were kept under cover inside libelant's plant at Port Wakefield until two or three days before the arrival of the SS "Denali" on October 23, 1946. The

dock at Port Wakefield will hold approximately 400 barrels and this number or less were moved on to the dock at the time indicated in order to facilitate the speedy departure of the ship. The remainder of the shipment stayed in the plant under cover.

Conditions in the plant are generally wet and cool due to the use of a great deal of water in processing. (20) The average temperature is probably about 50 degrees and has never in libelant's experience been what would be considered hot. Those barrels which were placed on the dock were immediately covered with tarpaulins and empty salt sacks. This covering was kept wet at all times until just before the arrival of the "Denali" when the covering was removed to prepare for loading.

Interrogatory No. 6: If the barrels were kept or stored on the open dock before loading state how many were so stored and for how long they were so stored and whether they were covered with tarpaulins or otherwise covered or protected.

Answer: Libelant does not know exactly how many barrels were stored on the open dock before loading. The capacity of the dock as stated is about 400 half barrels and the dock was not completely full. Such half barrels as were placed on the dock were there for not more than three days and were covered with tarpaulins and salt sacks and wet down as above stated.

Interrogatory No. 7: If barrels were kept or stored in a warehouse or covered space before loading state how many were so stored and for how long and what care or protection was afforded the barrels during that time.

Answer: All of the half barrels mentioned in the Libel were stored in libelant's plant under cover until two or three days before the "Denali" arrived on August 23, 1946, at which time something less than 400 of such half barrels were removed to the open dock. Such half barrels were stored for varying lengths of time. In general the number packed on each day as stated in libelant's answer [21] to Interrogatory No. 1 less the twenty per cent shrinkage were placed in said storage approximately ten days after processing was started. No particular care or protection was given or required by these barrels in covered storage as the weather was cool and conditions in all respects normal.

Interrogatory No. 8: State the maximum covered storage facilities at the cannery at Port Wakefield and whether said storage facilities were completely filled at the time the "Denali" loaded there on August 23, 1946.

Answer: Libelant's plant at Port Wakefield will accommodate 3,000 half barrels. The facilities were not filled at the time the "Denali" loaded there on August 23, 1946.

Interrogatory No. 9: When was the peak of the season in 1946 with reference to receipt of the largest quantity of fish at the cannery?

Answer: The peak of the season in 1946 with reference to receipt of the largest quantity of fish at libelant's cannery at Port Wakefield occurred during the month of September.

Interrogatory No. 13: In connection with packing or processing salt herring, state how long the completed product is supposed to remain sound after being packed and under what specific conditions.

Answer: Under cool room storage a barrel of salt herring will remain in good condition indefinitely. At ordinary room temperatures of around 70 degrees libelant does not believe it would remain sound for longer than one week. [22]

Interrogatory No. 14: Does the shipment of salt herring from Alaska to Seattle require cold storage or cool room storage or is it desirable or requested?

Answer: The shipment of salt herring from Alaska to Seattle does not require cold storage or cool room storage nor is it desired or requested by libelant. Any ordinary cool hold of the ship not containing steam pipes or bulkheads adjoining the engine room or containing steam pipes has been found satisfactory in libelant's experience.

Interrogatory No. 21: Please set forth a computation in detail of the damages to the shipment in question which is alleged in the Libel to be \$19,321.89.

Answer: A detailed computation of the damages to the shipment in question is as follows:

Value fair average quality salt herring, f.o.b. Seattle:	
110 quarter barrels medium at \$13.00 ea.....	\$ 1,430.00
119 half barrels large at \$23.00 ea.....	2,737.00
1129 half barrels medium at \$21.00 ea.....	23,709.00
<hr/>	
Total.....	\$27,876.00

Less, Proceeds of sales of above salt herring:

596 half barrels medium at \$15.75 ea.....	\$9,387.00
21 half barrels large at \$8.00 ea.....	168.00
79 half barrels medium at \$8.00 ea.....	632.00
22 quarter barrels medium at \$5.00 ea.....	110.00
8 quarter barrels medium at \$4.00 ea.....	32.00

10,329.00

\$17,547.00

Loss on sale of salt herring:

Following lots were adjudged unfit for human consumption and were picked up by a "scrap reduction" company:

- 80 quarter barrels medium
- 98 half barrels large
- 454 half barrels medium

Add, Extra costs of handling because of damage: [23]

Wahl Bros. Inv. No. 1442	
for inspection & culling.....	\$ 99.00
Wahl Bros. Inv. No. 1444	
for inspection & repair.....	67.97
Wahl Bros. Inv. No. 1485	
for inspection	54.00

Port of Seattle Bills:

Bill No. B97647—extra wharfage & handling to cold storage—971 half barrels 9/4/46	153.59
Bill No. B97648—receiving into cold storage 9/4/46	258.72
Bill No. B97649—rolling out for Pete Wahl's inspection from cold storage 9/7/46.....	157.86
Bill No. B97650—handling to cold storage 617 half barrels	250.54
Bill No. B98347—storage on 227 halves & 110 quarters 10/3/46 to 11/2/46.....	15.44
Bill No. B98348—storage on 354 halves from 9/11 to 10/10/46.....	16.06
Bill No. B98397—labor & rental of equipment for Pete Wahl's inspection 11/12/46.....	23.90
Bill No. 56916—cold storage on 617 lbs. 10/7/46 through 11/30/46.....	139.33

II.

That Lee H. Wakefield and Laverne E. Wakefield are residents of Seattle, King County, Washington, and at all times since January 13, 1947, have been and now are the duly designated, elected and qualified trustees of said corporation and of all of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

III.

That at all times herein mentioned the respondent, the United States of America, was and still is a sovereign [26] power which has by law consented to be sued herein.

IV.

That at all times herein mentioned the respondent, the United States of America, was and now is the owner and operator of the steamship Denali and was the carrier of the cargo hereinafter mentioned.

V.

That at all times hereinafter mentioned said vessel was either a public vessel of the United States of America or employed by the respondent as a merchant vessel and in either event was operated by or on behalf of the respondent as a common carrier of merchandise for hire.

VI.

That if said vessel were privately owned or possessed, a proceeding in admiralty in rem and in personam could now be maintained against said vessel and against her owner by libellant for the loss and

damage hereinafter alleged and libelant hereby elects to proceed upon the principles of both a libel in personam and a libel in rem.

VII.

That the steamship Denali was at the time of the filing of the original libel herein within this district and within the jurisdiction of this Honorable Court.

VIII.

That on August 23, 1946, the said libelant delivered to the respondent at the port of Port Wakefield, Alaska, certain merchandise in good order and condition, to-wit, 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1,129 half barrels of medium salt herring to be carried from said port of shipment to the port of [27] Seattle, Washington, and there to be delivered in like good order and condition as when shipped to the order of James Farrell and Co. in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the Warship short lading Form, then and there signed and delivered to said shipper by the duly authorized agent or representative of the respondent.

IX.

That thereafter respondent loaded all the aforesaid merchandise aboard the steamship Denali and the vessel having on board said merchandise sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington, still having the said merchandise aboard, but not in like good order

and condition as when delivered to respondent, but damaged, destroyed and a portion thereof rendered wholly valueless.

X.

That at all times herein mentioned libelant was the sole owner of said merchandise and the sole owner of the right to sue and recover for the damage thereto.

XI.

That by reason of respondent's failure to deliver said merchandise in good order and condition as received, libelant has been damaged in the sum of \$19,321.89, being the difference between the reasonable value of said merchandise in the condition in which it was discharged and delivered to respondent and the value such merchandise would have had f.o.b. Seattle had respondent discharged and delivered it to libelant at said port of discharge in like good order and condition as when received by respondent, together with [28] necessary and reasonable charges incurred by libelant in the storage, handling, keeping and disposition of said merchandise.

XII.

That the libelant has fully performed all of the terms and conditions of said contract of carriage by it to be done or performed.

XIII.

That this suit is brought under the Act of March 9, 1920, known as the Suits in Admiralty Act and also chapter 95, 41 Statutes at Large 525, 46 U.S.C.,

Sections 741 to 752, inclusive, and also pursuant to and by virtue of authority given in the Suits in Admiralty (Public Vessels) Act of March 5, 1925, chapter 426, 43 Statutes at Large 1112, 46 U.S.C., Sections 781 to 790, inclusive.

XIV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore libelant prays that upon service of a copy of this libel upon the United States Attorney for the Western District of Washington, Northern Division, and upon the mailing of a copy thereof by registered mail to the Attorney General of the United States and the filing of a sworn return of such service and mailing in accordance with title 46, United States Code, Section 742, respondent be ordered to appear and answer upon oath all and singular the matters aforesaid and that this Honorable Court will be pleased to decree payment from the respondent to the libelant of the damages aforesaid with interest and costs and that libelant have such other, further or different relief as to [29] the court may seem meet, proper and just in the premises and as in law and justice it may be entitled to receive.

/s/ EDWARD M. HAY and

/s/ DAVID O. HAMLIN,

Proctors for Libelant.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 27, 1948. [30]

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL

To the Honorable Judges of the Above-Entitled Court:

The Answer of the respondent, The United States of America, to the Amended Libel herein admits, denies and alleges as follows:

I.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph I and therefore denies the same.

II.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph II and therefore denies the same.

III.

Respondent admits the allegations of Paragraph III.

IV.

Respondent admits the allegations of Paragraph IV.

V.

Respondent admits the allegations of Paragraph V.

VI.

Respondent denies the allegations of Paragraph VI.

VII.

Respondent denies the allegations of Paragraph VII. [31]

VIII.

Respondent admits that on or about August 23, 1946, the cargo alleged in Paragraph VIII of the Libel, to-wit: 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1129 half barrels of medium salt herring was loaded on board the SS "Denali" for carriage to Seattle, Washington, pursuant to the valid terms of bill of lading issued by the Respondent and Respondent denies each and every other allegation contained in said Paragraph VII and particularly denies that said cargo, at the time of delivery to and loading upon the said vessel, was in good order and condition.

IX.

Respondent admits that said cargo as loaded on board the SS "Denali" arrived at the Port of Seattle and was delivered to the libelant and/or consignee but denies that the same or any part thereof was not in like good order and condition as when delivered to Respondent and denies that the same was completely damaged or destroyed in any respect whatsoever as a result of the carriage of said cargo or any fault or liability of the Respondent or the said vessel, its officers or crew, or at all.

X.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph X and therefore denies the same.

XI.

Respondent denies that libelant has been damaged in the sum of \$19,321.89 or any other sum whatso-

ever and denies that it failed to deliver said cargo in as good order and condition as when received by the Respondent and the vessel, and denies that Respondent is liable in any event for the f.o.b. Seattle value or [32] for any charges for storage, handling or otherwise, and denies that such charges were necessarily incurred.

XII.

Respondent denies the allegations of Paragraph XII.

XIII.

Respondent admits the allegations of Paragraph XIII.

XIV.

Respondent admits the admiralty jurisdiction but denies that the premises are true.

Further Answering and by Way of First Affirmative Defense, Respondent Alleges:

I.

That the shipment of cargo referred to in the Libel was carried by the Respondent, United States of America, pursuant to the valid terms and conditions of a bill of lading issued by the Respondent and delivered to the Libelant, which said bill of lading was on the regular form of Warship lading, 7142 for July 1, 1942, (Sec. 303.11, Title 46, CFR, Cum. Supp. 11,336) of the United States War Shipping Administration and incorporated therein the provisions of the Carriage of Goods By Sea Act (46 U.S.C.A. 1300 et seq.) which said bill of lading and the said statutes governed the under-

taking of the parties hereto with respect to the carriage of all of said cargo; that the Libelant is now and at all times material herein has been in possession of the originals or exact copies of said bill of lading governing the shipment herein described.

II.

That the said bill of lading issued for the shipment referred to in the Libel contained among others the following provision: [33]

“This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States of America approved April 16, 1936, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or ammunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (unless or except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier * * *”

III.

That any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the said vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was the result of inherent

defect, quality or vice of the goods as shipped aboard the vessel, one of the causes excepted in the bill of lading hereinabove referred to and excepted in the Carriage of Goods by Sea Act hereinabove referred to and that if any of said damage was the result of negligence of the officers or crew or other agents of the Respondent or of the vessel such negligence consisted of faults or errors in navigation or in the management of the vessel for which the Respondent and the vessel are excused from liability pursuant to the applicable provisions of the said Carriage of Goods By Sea Act.

Further Answering and by Way of Second Affirmative Defense, Respondent Alleges:

I.

Respondent re-alleges Paragraphs I, II and III of the First Affirmative Defense and by this reference incorporates the same fully herein.

II.

That any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the [34] vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was solely the result of one of the causes excepted to in the bill of lading hereinabove referred to excepted to in the Carriage of Goods By Sea Act hereinabove referred to, to-wit, was the result of a strike and stoppage of work by the Maritime Unions at the Port of Seattle and other ports on Puget Sound, which

said strike prevented the unloading of the said vessel and of libelant's cargo from said vessel until on and after September 25, 1946, for which delay the Respondent is not liable and that if any of said damage was the result of any negligence of any officers or crew or other agents of the Respondent or of the vessel such negligence consisted in faults or errors in navigation or in the management of the vessel for which the Respondent and the said vessel are excused from liability pursuant to the applicable provisions of the said Carriage of Goods By Sea Act.

Wherefore, Respondent prays that the Libel herein be dismissed and that Libelant take nothing thereby and that Respondent have and recover costs and for such other and further relief as to the Court may seem just in the premises.

/s/ J. CHARLES DENNIS,
United States Attorney, Proctor for Respondent,
United States of America.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel. [35]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 2, 1948. [36]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED
RESPONDENT BY LIBELANT

Comes now the libelant and herewith propounds to the respondent the following interrogatories to

be answered in writing and under oath as required by the rules and practice of this court, to-wit:

Interrogatory No. 1: Please state what was done to make the SS "Denali" seaworthy and properly manned, equipped with supplies at the beginning of the voyage during which libelant's 1,358 barrels of herring mentioned in the amended libel were carried from Port Wakefield, Alaska, to Seattle, Washington.

Interrogatory No. 2: State what records, if any, were kept by respondent or any agent or agency thereof with reference to stowage of the cargo of 1,358 barrels of herring mentioned in the amended libel aboard the SS "Denali."

Interrogatory No. 3: Please designate the portion or portions of the Denali in which the cargo of herring mentioned in the amended libel was stowed, giving the number of barrels stowed in each place, if more than one, and the exact location in the hold. [37]

Interrogatory No. 4: State the maximum daily temperature on each day of the voyage and after the termination thereof during which the cargo of salt herring mentioned in the amended libel was carried or kept aboard the SS "Denali" in each portion of the ship where said cargo was so carried or kept.

Interrogatory No. 5: Please furnish a drawing or diagram of each portion of the Denali where the salt herring mentioned in the amended libel was carried or kept, showing the exact location of said cargo, and the exact location of any steampipes,

shaft alleys, or other sources of heat, whether open or concealed in bulkheads or otherwise.

Interrogatory No. 6: State what special precautions, if any, were taken at the beginning of the voyage or thereafter to protect the cargo of salt herring mentioned in the amended libel from heat damage.

Interrogatory No. 7: State what, if anything, was done at the beginning of the voyage or thereafter to secure those portions of the Denali where the cargo of herring mentioned in the amended libel was kept or carried from heat deemed by respondent to be excessive or dangerous with reference to the type of cargo to be carried.

Interrogatory No. 8: State whether there were any steampipes within the hold or holds where the cargo of salt herring mentioned in the amended libel was carried or in the bulkheads thereof; and if so, state the portions of the voyage during which they were charged with steam, the temperature thereof and the proximity of such steampipes to the cargo of salt herring. [38]

Interrogatory No. 9: State what inherent defect, quality or vice existed in the cargo of herring mentioned in the amended libel at the time said goods were shipped aboard the Denali.

Interrogatory No. 10: State whether respondent has in its possession, custody or control any plan, diagram, drawing, photograph, or object of a similar nature showing the structural disposition of the hold or other portions of the Denali where the cargo of salt herring mentioned in the amended

libel was kept or carried, or the location of bulkheads, shaft alleys, steampipes or other sources of heat with reference to the place or places said cargo was stowed as they existed during the time such cargo was so kept or carried.

Interrogatory No. 11: If respondent's answer to Interrogatory No. 10 was in the negative, state whether or not, if within respondent's knowledge any such diagram, drawing, photograph or object of a similar nature exists and the whereabouts thereof.

Interrogatory No. 12: Please state the names and last known residence and/or mailing addresses of all persons superintending or having knowledge of the stowage of the cargo of salt herring mentioned in the amended libel aboard the Denali on the voyage from Port Wakefield, Alaska to Seattle, Washington.

Interrogatory No. 13: Please state whether or not any portion or portions of the cargo of salt herring mentioned in the amended libel was overstowed with any other cargo or material; and if so, give a description of the type of such cargo or material and the amount thereof. [39]

Interrogatory No. 14: Please state the acts constituting negligence of the officers or crew or other agents of the respondent or of the vessel, which negligence is alleged to consist of faults or errors in navigation or in the management of the vessel, and for which the respondent and the vessel are alleged in paragraph III of Respondent's First Affirmative Defense to be excused from liability

pursuant to the applicable provisions of the Carriage of Goods by Sea Act.

Interrogatory No. 15: Please state how many of the barrels of salt herring mentioned in the amended libel were discharged from the Denali prior to the strike and stoppage of work by the Maritime Unions at the Port of Seattle alleged in paragraph II of Respondent's Second Affirmative defense.

Interrogatory No. 16: Please state whether any of the barrels of salt herring mentioned in the amended libel discharged from the Denali prior to such strike and stoppage of work were in a damaged condition, and if so, how many?

Interrogatory No. 17: State the day and the hour when the Denali was required to suspend discharging her cargo as a result of the strike and stoppage of work mentioned in Respondent's Second Affirmative defense.

Interrogatory No. 18: State the time of the day on September 25, 1946, when the strike and stoppage of work alleged in the Second Affirmative defense ended.

Interrogatory No. 19: When were the remainder of the barrels of salt herring mentioned in the amended libel discharged from the Denali after termination of such strike and stoppage of work on September 25, 1946? [40]

Interrogatory No. 20: State whether any survey or inspection was made of the barrels of salt herring mentioned in the amended libel at or after the time of discharge from the Denali at Seattle

by any employee, officer, or agent of respondent; whether or not such survey or inspection was made alone or jointly with any other person: the dates of such surveys or inspections, if more than one, and the name or names of the persons making the same.

Interrogatory No. 21: If a survey or inspection was made as stated in Interrogatory No. 20, state whether the salt herring mentioned in the libel was found to be in a damaged condition, and the apparent cause thereof, such as freezing, exposure to heat, contamination, or other cause.

Interrogatory No. 22: State whether any inspection or survey was made of the salt herring mentioned in the amended libel by respondent or anyone on its behalf at or about the time such salt herring was delivered to the Denali at Port Wakefield, Alaska.

Interrogatory No. 23: In respondent's answer to Interrogatory No. 22 was "yes," state the nature and extent of such inspection and what such inspection revealed as to the condition of such salt herring.

/s/ EDWARD M. HAY,

and

/s/ DAVID O. HAMLIN,

Proctors for Libelant, Apex Fish Company.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 28, 1948. [41]

[Title of District Court and Cause.]

ORDER ON RESPONDENT'S EXCEPTIONS
TO LIBELANT'S INTERROGATORIES

The above-entitled cause having come on regularly for hearing before the undersigned Judge of said Court on April 5, 1948, on respondent's exceptions to libelant's interrogatories, libelant appearing by its proctor David O. Hamlin, respondent appearing by its proctor Claude Wakefield, the libelant having moved the court for an order overruling said exceptions, the Court having heard the argument of proctors for the respective parties, having considered the records and files herein, the authorities submitted by the parties and having heretofore orally announced its decision and being now fully advised, it is by the Court

Ordered that respondent's exception to libelant's interrogatory No. 1 be and the same is hereby sustained; and it is further

Ordered that respondent's exceptions to libelant's interrogatories No. 4, 5, 6, 7, 8, 10, 11, 12, 14 and 21 be and the same are hereby overruled; provided, however, that respondent shall not be required to make or prepare any drawing or diagram requested in said interrogatories which is not already in existence; and it is further

Ordered that the Court does hereby reconsider its ruling heretofore made on libelant's exceptions to respondent's [42] interrogatories as contained in order entered herein January 19, 1948, and the same is modified in that libelant's exceptions to respondent's interrogatories numbered 10, 11, 12,

15, 16 and 17 be and the same are hereby over-ruled.

Done in open Court this 10th day of April, 1948.

JOHN C. BOWEN,
District Judge.

Presented by:

DAVID O. HAMLIN,
Of Proctors for Libellant.

Approved as to form and Notice of Presentation
Waived:

/s/ CLAUDE E. WAKEFIELD,
Of Proctors for Respondents.

[Endorsed]: Filed April 10, 1948. [43]

[Title of District Court and Cause.]

LIBELANT'S REQUEST FOR ADMISSIONS
UNDER ADMIRALTY RULE 32B

The libellant requests the respondent to admit the truth of the following relevant matters of fact herein set forth for the purpose of the pending action only:

1. That at all times mentioned in the amended libel herein the libellant Apex Fish Company was and ever since has been a corporation organized and existing under and by virtue of the laws of the State of Washington having its principal office and place of business at Seattle, King County, Washington, within the above judicial district and has paid all license fees.

2. That Lee H. Wakefield and Laverne E. Wakefield are residents of Seattle, King County, Washington, and at all times since January 13, 1947, have been and now are the duly designated, elected and qualified trustees of said corporation and of all of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

3. That no license fees are required by the laws of the state of Washington of a corporation which has entered upon voluntary dissolution as a prerequisite to doing business or maintaining an action in the above entitled court including this action. [44]

4. That at the time of the filing and service of the original libel herein the SS "Denali" was within the above-entitled district and within the jurisdiction of this honorable court.

5. That at all times mentioned in the amended libel herein libelant was the sole owner of the merchandise for which recovery is sought herein.

6. That the reasonable market value f.o.b. Seattle, Washington, of salt herring of the grade and quality of that in suit herein, if undamaged, at the time of delivery by respondent to libelant at Seattle, Washington, was as follows:

Quarter barrels medium,	\$13.00 each
Half barrels large,	23.00 each
Half barrels medium,	21.00 each

7. That Exhibit "A" hereto attached is a true copy of the Bill of Lading signed and delivered to libelant by a duly authorized agent or representative of the respondent at Port Wakefield, Alaska, on August 23, 1946, covering the shipment for which recovery is sought herein.

8. That the libelant has fully performed all of the terms and conditions of said Bill of Lading and of the contract of carriage alleged in the amended libel by libelant to be done or performed including full payment of the agreed freight to respondent.

9. That upon discharge of the merchandise referred to in the amended libel from the Denali at Seattle, Washington, the following portion of such shipment was unfit for human consumption and had no salvage value whatsoever:

80 quarter barrels medium salt herring.

98 half barrels large salt herring.

454 half barrels medium salt herrin. [45]

10. That the balance of said shipment referred to in the amended libel herein, at the time of its discharge from the Denali at Seattle, Washington, after deduction of the 632 barrels mentioned in request number nine, had no salvage or other value whatsoever, save and except the following:

596 half barrels medium at \$15.75 ea.	\$9,387.00
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21 half barrels large at \$8.00 each	168.00
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79 half barrels medium at \$8.00 each	632.00
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22 quarter barrels medium at \$5.00 ea.	110.00
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8 quarter barrels medium at \$4.00 ea.	32.00
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Total salvage.....	\$10,329.00
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11. That the following expenditures were reasonable in amount and were necessarily incurred by libelant in care, preservation and sale of the salt herring mentioned in the amended libel herein:

Wahl Bros. Inv. No. 1442 for inspection & culling.....	99.00
Wahl Bros. Inv. No. 1444 for inspection & repair	67.97
Wahl Bros. Inv. No. 1485 for inspection..	54.00
Port of Seattle Bills:	
Bill No. B97647—extra wharfage & han- dling to cold storage—971 half barrels 9/4/46	153.59
Bill No. B97648—receiving into cold stor- age 9/4/46.....	258.72
Bill No. B97649 —rolling out for Pete Wahl's inspection from cold storage 9/7/46	157.86
Bill No. B97650—handling to cold storage 617 half barrels.....	250.54
Bill No. B98347—storage on 277 halves & 110 quarters 10/3/46 to 11/2/46.....	15.44
Bill No. B98348 —storage on 354 halves from 9/11 to 10/10/46.....	16.06
Bill No. B98397—labor & rental of equip- ment for Pete Wahl's inspection 11/12/46	23.90
Bill No. 56916—cold storage on 617 bbls. 10/7/46 through 11/30/46.....	139.33

Bill No. 57243 — wharf storage on 354 halves 10/11 through 12/31/46 and on 387 halves 11/3/46 through 11/30/46 and on 278 halves 12/1/46 through 12/31/46	68.48
L. C. Perry, Marine Surveyor.....	450.00
Laucks Laboratories, Inc.....	10.00
No. 96267	
No. 96557	10.00
<hr/>	
Total.....	\$1,774.89

12. That the absence of any value whatsoever as to the 80 quarter barrels medium, 98 half barrels large, 454 half barrels medium mentioned in request number nine herein; the difference between the market value set forth in request number six herein and the salvage value of the 726 barrels set forth in request number ten herein; and the incurring of the expense set forth in request number nine herein were each and all the direct and proximate result of the damaged and deteriorated condition of the said cargo of herring mentioned in the amended libel herein at the time and place of discharge and delivery to libellant at Seattle, Washington.

Libellant hereby designates the period within which respondent may serve upon libellant a sworn statement either denying specifically the matters of which an admission is requested or setting forth

in detail the reasons why respondent cannot truthfully either admit or deny those matters to be the ten days next elapsing after service of this request

/s/ EDWARD M. HAY,

and

/s/ DAVID O. HAMLIN,

Proctors for Libelant.

(Acknowledgment of Service.)

[Endorsed]: Filed April 8, 1948. [47]

MASTER'S AGENT

(SHORT FORM)

M. 2.

_Voyage No. _____

Pre No.

(If goods to be trans-shipped at Port of Discharge)

tion of Goods: SEATTLE WASHINGTON

(See Clause 11 of Warrickpolding referred to herein)

THE SCOPE OF THE VOYAGE IS REFERRED TO IN THE PREAMBLE AND CLAUSE 8 OF "WARSHIPPLADING" REFERRED TO HEREIN

PARTICULARS FURNISHED BY SHIPPER OF GOODS

12--If the goods herein covered are carried on a vessel owned by or under bareboat charter to the United States and which is a Public Vessel of the United States, administration on behalf of the United States, hereby assumes all liabilities it would have with respect to the carriage of such goods if the vessel were a merchant vessel with respect to cargo owned by the United States or any Agency or Department thereof, and load-loss cargo. This clause is to be construed only as an agreement that cargo carried on such a public vessel shall be treated as though the carrying vessel were a merchant vessel with respect to liability for loss or damage to such cargo.

WANNING

Disclosure of the contents of this bill of lading to any unauthorized person may involve an offence against the Espionage Act of the United States (50 U.S.C. 81 and 89, as amended), or against the Official Secrets Act, 1911 and 1920, or the Defence (General) Regulations, of the United Kingdom.

PREPAID TO APPLY

3

ACCEPTING THIS BILL OF LADING, the shipper, consignee, pledge, holder or endorsee of the bill of lading, receiver, owner of the goods and each of them agree that all freight, charges, duties, taxes, and expenses of whatever nature and in whatever capacity incurred by or for the goods or the shipper, consignee, pledge, holder or endorsee of the bill of lading, receiver, owner of the goods and each of them shall be paid by the shipper, consignee, pledge, holder or endorsee of the bill of lading, receiver, owner of the goods and each of them, and agree to be bound by all the terms whether written or printed, stamped on the front or back thereof or incorporated by reference therein, any local regulations to the contrary notwithstanding.

signed, one signed bill of lading duly endorsed must be surrendered to the agent of
is part of discharge in exchange for delivery order.

Ship is not owned by or chartered by demise to the War Shipping Administration or
any signing this bill of lading for the Master (so may be the case notwithstanding
appears to the contrary) this bill of lading shall take effect only as a contract
or demise charter, or the case may be, as principal, made through the War Ship-
ping Administration or the Company signing this bill of lading for the Master;
agent only and shall be under no personal liability whatsoever to respect thereof.

HIT "A"

IN WITNESS WHEREOF, the Master of the said
has affirmed to this bill of lading.

Dated at Port Wakefield, Alaska

this 23rd day of August

For the Worker

By ALASKA STEAMSHIP COMPANY

As Agent for the Master

By: _____

B/L No.

48 Shoe

[Title of District Court and Cause.]

RESPONDENT'S ANSWERS TO DEMAND
FOR ADMISSIONS
(Admiralty Rule 32B)

Respondent makes the following answer to libelant's request for admissions:

I.

Respondent has no knowledge or information as to the legal corporate status of the libelant and has no means of obtaining the same except through the Office of the Secretary of State of Washington at Olympia and by the purchase of a certificate or certificates of good standing and that said request is improper and not within the provisions of Admiralty Rule 32B and that the same calls for a legal conclusion, wherefore respondent is unable to admit the demand contained in Paragraph I.

II.

Respondent makes the same response to Paragraph II as is set forth above in Paragraph I and additionally respondent states that said demand for admission is improper and irrelevant and calls for the admission of a legal conclusion based upon facts not in respondent's possession nor available to respondent.

III.

Respondent refuses to answer Paragraph III for the reason that the same is improper and irrelevant and calls for a legal conclusion of a matter which is within the province of the Court [49] to determine. Respondent has no knowledge or information of the facts nor can respondent obtain the same.

IV.

The libel was filed July 29, 1947, and respondent is advised that the same was served upon the Attorney General of the United States August 4, 1947. The SS "Denali" sailed from Seattle for Alaska on July 31, 1947, and was not thereafter in Seattle until August 18, 1947.

V.

Respondent has no knowledge or information as to the ownership of the cargo which is the subject matter of the libel nor any means of determining the same. The libel does not allege that libelant was the owner. Ownership is a legal conclusion for the Court to determine. Respondent admits that Apex Fish Company shipped the cargo in question consigned to the order of James Farrell & Co. at Seattle as evidenced by the Bill of Lading and that respondent was obligated to and did deliver said cargo to James Farrell & Co., the only party entitled thereto.

VI.

Respondent has no knowledge or information as to the sound value of barrels of salt herring in Seattle on September 4, 1946, or September 26, 1946, nor has respondent any means of ascertaining such value except by actual sales made by libelant or others and respondent has no means of knowing to whom such herring was sold on September 4, 1946, or on any other date. The libel does not allege such values or any values per barrel of herring. There is no established or public market or quota-

tion known to respondent, wherefore respondent cannot and does not admit the same.

VII.

Respondent admits that Exhibit "A" attached to the demand for admissions in a photostatic copy of the Bill of Lading covering [50] the shipment in question on the Warship Short Lading Form of the United States War Shipping Administration incorporating therein "The Uniform Bill of Lading (Warship Lading 7-1-42) adopted by General Order No. 16 of the Administrator, War Shipping Administration, July 4, 1942, which shall be deemed incorporated herein * * *."

VIII.

Libelant is not obligated to perform any terms and conditions of the Bill of Lading beyond the delivery of the quantity of cargo receipted for and delivery of the same in good order and condition and respondent denies that libelant delivered said cargo to respondent in good order and condition. All other terms and conditions of the Bill of Lading insofar as respondent is concerned are the obligations of the consignee James Farrell & Co. Respondent admits that the agreed freight was paid by James Farrell & Co.

IX.

Neither the libel nor the amended libel alleges the number of barrels claimed to be unfit for human consumption. However, the Survey Report of Alexander Gow, Inc., in the possession of respondent states as follows:

"Shipped Quantity	Fair Quality	Poor Quality	Valueless	Total
1129½ Bbl. Med.	596	79	454	
119½ Bbl. Lge.		21	98	
110¼ Bbl. Med.		30	80	
	<hr/> 596	<hr/> 130	<hr/> 632	<hr/> 1358"

X.

Respondents are advised in the Survey Report of Alexander Gow, Inc., above referred, that the sum of \$10,329 salvage was realized by the owner of the cargo in question by sale to the highest bidder. [51]

XI.

Respondent denies all of the items of expense as being necessarily incurred by libelant and has no knowledge or information as to the extent, nature or reasonableness of the charges, none of which were incurred with the knowledge or consent of the respondent except the sum of \$585.30 approved by respondent's surveyor, Alexander Gow, Inc., without prejudice to liability or responsibility therefor as follows:

"Wahl Bros. Inspection & Segregation	\$99.00
Wahl Bros. Inspection & Segregation	54.00
Removing herring from cold storage to warehouse for inspection & segregation	157.86
Return to cold storage.....	250.54
Labor & equipment for inspection.	23.90

\$585.30"

XII.

Respondent declines to answer Paragraph XII for the reason that it is a duplication of previous requests herein contained and herein answered; that it calls for a conclusion of law; that it calls for the expression of opinion and not of fact and that it is within the province of the Court to determine the conclusions as to the proximate cause of damage and the items legally recoverable if any.

J. CHARLES DENNIS,

United States Attorney, Proctor for Respondent.

BOGLE, BOGLE & GATES

CLAUDE E. WAKEFIELD,

Of Counsel. [52]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 16, 1948. [53]

[Title of District Court and Cause.]

RESPONDENTS ANSWER TO INTERROGATORIES PROPOUNDED BY LIBELANT.

Respondent herewith answers Libelant's interrogatories as follows:

Interrogatory No. 2: State what records, if any, were kept by respondent or any agent or agency thereof with reference to stowage of the cargo of 1,358 barrels of herring mentioned in the amended libel aboard the SS "Denali."

Answer: A stowage plan and hatch list.

Interrogatory No. 3. Please designate the portion or portions of the Denali in which the cargo of herring mentioned in the amended libel was stowed; giving the number of barrels stowed in each place, if more than one, and the exact location in the hold.

Answer: 971 half barrels in No. 3 lower hold center. 110 quarter barrels and 277 half barrels in No. 4 lower hold center.

Interrogatory No. 4: State the maximum daily temperature on each day of the voyage and after the termination thereof during which the cargo of salt herring mentioned in the amended libel was carried or kept aboard the SS "Denali" [54] in each portion of the ship where said cargo was so carried or kept.

Answer: No maximum temperatures were taken. The log book records temperatures irregularly as follows:

August 23, 1946. 11:58 A.M. Arrived Port Wakefield. Temperature 62°.

August 24, 1946. 8:52 A.M. Arrived Port Vita. Temperature 57°.

August 25, 1946. Port Bailey. 19.04. Temperature 54°.

August 26, 1946. 02:26 (A.M.) Left Port Bailey. Temperature 52°.

August 26, 1946. Womans Bay. 12:00 Noon. Temperature 55°.

Similar temperatures were taken at indiscriminate times varying from 50 to 66 degrees upon arrival at Seattle, September 2, 1946, at 15:56 (P.M.) all as set forth in the vessel's log book.

Interrogatory No. 5: Please furnish a drawing or diagram of each portion of the Denali where the cargo of salt herring mentioned in the libel was carried or kept, showing the exact location of said cargo, and the exact location of any steampipes, shaft alleys, or other sources of heat, whether open or concealed in bulkheads or otherwise.

Answer: No such drawing or diagrams are available except the stowage plan which is in Respondent's possession and except a scale drawing of all of the holds which is in Respondent's possession and which is available for photostating by Libellant if desired. No steampipes are shown as there are no steampipes in these holds or in bulkheads.

Interrogatory No. 6: State what special precautions, if any, were taken at the beginning of the voyage or thereafter to protect the cargo of salt herring mentioned in the amended libel from heat damage.

Answer: No precautions were taken nor are required. The lower holds are not subjected to heat at any time, they are below the water line and remain cool. They have no steampipes and are used frequently to carry perishable cargoes.

Interrogatory No. 7: State what, if anything, was done at the beginning of the voyage or thereafter to secure those portions of the Denali where the cargo of herring mentioned in the amended libel was kept or carried from heat deemed by respondent to be excessive or dangerous with reference to the type of cargo to be carried.

Answer: Nothing was done nor required to be done. The herring was not shipped as cold storage

Interrogatory No. 3. Please designate the portion or portions of the Denali in which the cargo of herring mentioned in the amended libel was stowed; giving the number of barrels stowed in each place, if more than one, and the exact location in the hold.

Answer: 971 half barrels in No. 3 lower hold center. 110 quarter barrels and 277 half barrels in No. 4 lower hold center.

Interrogatory No. 4: State the maximum daily temperature on each day of the voyage and after the termination thereof during which the cargo of salt herring mentioned in the amended libel was carried or kept aboard the SS "Denali" [54] in each portion of the ship where said cargo was so carried or kept.

Answer: No maximum temperatures were taken. The log book records temperatures irregularly as follows:

August 23, 1946. 11:58 A.M. Arrived Port Wakefield. Temperature 62°.

August 24, 1946. 8:52 A.M. Arrived Port Vita. Temperature 57°.

August 25, 1946. Port Bailey. 19.04. Temperature 54°.

August 26, 1946. 02:26 (A.M.) Left Port Bailey. Temperature 52°.

August 26, 1946. Womans Bay. 12:00 Noon. Temperature 55°.

Similar temperatures were taken at indiscriminate times varying from 50 to 66 degrees upon arrival at Seattle, September 2, 1946, at 15:56 (P.M.) all as set forth in the vessel's log book.

Interrogatory No. 5: Please furnish a drawing or diagram of each portion of the Denali where the cargo of salt herring mentioned in the libel was carried or kept, showing the exact location of said cargo, and the exact location of any steampipes, shaft alleys, or other sources of heat, whether open or concealed in bulkheads or otherwise.

Answer: No such drawing or diagrams are available except the stowage plan which is in Respondent's possession and except a scale drawing of all of the holds which is in Respondent's possession and which is available for photostating by Libellant if desired. No steampipes are shown as there are no steampipes in these holds or in bulkheads.

Interrogatory No. 6: State what special precautions, if any, were taken at the beginning of the voyage or thereafter to protect the cargo of salt herring mentioned in the amended libel from heat damage.

Answer: No precautions were taken nor are required. The lower holds are not subjected to heat at any time, they are below the water line and remain cool. They have no steampipes and are used frequently to carry perishable cargoes.

Interrogatory No. 7: State what, if anything, was done at the beginning of the voyage or thereafter to secure those portions of the Denali where the cargo of herring mentioned in the amended libel was kept or carried from heat deemed by respondent to be excessive or dangerous with reference to the type of cargo to be carried.

Answer: Nothing was done nor required to be done. The herring was not shipped as cold storage

nor cool room stowage requested nor contracted for. The lower holds Nos. 3 and 4 are ordinary ships holds below the water line. They are not hot but remain at average outside temperatures.

Interrogatory No. 8: State whether there were any steampipes within the hold or holds where the cargo of salt herring mentioned in the amended libel was carried or in the bulkheads thereof; and if so, state the portions of the voyage during which they were charged with steam, the temperature thereof and the proximity of such steampipes to the cargo of salt herring.

Answer: There are not any steampipes in the holds where the herring was stowed, nor in any bulkheads of said holds. [56]

Interrogatory No. 9: State what inherent defect, quality or vice existed in the cargo of herring mentioned in the amended libel at the time said goods were shipped aboard the *Denali*.

Answer: The inherent defect quality or vice of the cargo at the time of shipment consisted of:

1. Fish being held too long at the cannery before processing due to congestion or otherwise.

2. Improper curing and preparation of the herring such as insufficient salt or brine.

3. The barrels of herring being held too long at the cannery before shipment (See Answer of libellant to respondent's interrogatory No. 1) and barrels of herring not being properly refrigerated during the time held at the cannery.

4. The barrels of herring being stored in the open dock at the cannery, subjected to the warm sun.

5. Other inherent causes not known to the respondent.

Interrogatory No. 10. State whether respondent has in its possession, custody or control any plant, diagram, drawing, photograph, or object of a similar nature showing the structural disposition of the hold or other portions of the Denali where the cargo of salt herring mentioned in the amended libel was kept or carried, or the location of bulkheads, shaft alleys, steampipes or other sources of heat with reference to the place or places said cargo was stowed as they existed during the time such cargo was so kept or carried.

Answer: See Respondent's answer to Interrogatory No. 5 above, copies of which said stowage plan and scale drawing of the [57] holds are available to Libellant for photostating upon request.

Interrogatory No. 11: If respondent's answer to Interrogatory No. 10 was in the negative, state whether or not, if within respondent's knowledge any such diagram, drawing, photograph or object of a similar nature exists and the whereabouts thereof.

Answer: Respondent believes that the builder's plans may be available if required.

Interrogatory No. 12: Please state the names and last known residence and/or mailing addresses of all persons superintending or having knowledge of the stowage of the cargo of salt herring mentioned in the amended libel aboard the Denali on the voyage from Port Wakefield, Alaska to Seattle, Washington.

Answer: Arney Burns, Chief Officer, Alaska Steamship Company. P. A. Teichroew, Purser, Alaska Steamship Company. J. Johanson, Foreman-Stevedore, Alaska Terminal and Stevedoring Company.

Interrogatory No. 13: Please state whether or not any portion or portions of the cargo of salt herring mentioned in the amended libel was overstowed with any other cargo or material; and if so, give a description of the type of such cargo or material and the amount thereof.

Answer: No cargo was stowed on top of the barrels of herring in No. 3 lower hold, but some cases of canned salmon were stowed on top of the barrels of herring in No. 4 lower hold. As there was nothing but canned salmon in No. 4 lower hold except the salt herring, it is not known definitely how many cases of such salmon were stowed on top of the herring. [58]

Interrogatory No. 14: Please state the acts constituting negligence of the officers or crew or other agents of the respondent or of the vessel, which negligence is alleged to consist of faults or errors in navigation or in the management of the vessel, and for which the respondent and the vessel are alleged in paragraph III of Respondent's First Affirmative Defense to be executed from liability pursuant to the applicable provisions of the Carriage of Goods by Sea Act.

Answer: There was no negligence, faults or errors in navigation or in the management of the vessel known to respondent.

Interrogatory No. 15: Please state how many of the barrels of salt herring mentioned in the amended libel were discharged from the Denali prior to the strike and stoppage of work by the Maritime Unions at the Port of Seattle alleged in paragraph II of Respondent's Second Affirmative defense.

Answer: 971 out of a total of 1358 barrels of herring stowed in No. 3 lower hold were discharged at Bell Street Terminal, September 4, 1946, between 8:15 a.m. and 12:00 o'clock noon. A stop-work meeting was called for 11:00 a.m. September 4 and sailors thereafter did not return to the vessel. This strike ended midnight September 12 and was followed immediately at 12:01 a.m. September 13 by a further strike, the sailor pickets being immediately replaced by the cooks' and stewards' pickets, which said strike continued until midnight September 22, 1946. From September 23, 1946 through midday September 26, 1946, SUP members refused to return to work. The sailors started to ship crews and return to work shortly before noon [59] September 26. The balance of the salt herring was discharged from No. 4 lower hold about September 26, 1946.

Interrogatory No. 16: Please state whether any of the barrels of salt herring mentioned in the amended libel discharged from the Denali prior to such strike and stoppage of work were in a damaged condition, and if so, how many?

Answer: Some barrels discharged before the strike from No. 3 lower hold were alleged to be

damaged, but respondent does not know how many. Mr. Johanson, who superintended the discharge of said cargo, states that after about 100 barrels had been discharged on September 4, 1946 "I was informed by the dock that contents of the barrels were spoiled."

Interrogatory No. 17: State the day and the hour when the Denali was required to suspend discharging her cargo as a result of the strike and stoppage of work mentioned in Respondent's Second Affirmative defense.

Answer: 11:00 a.m., September 4, 1946, but officially 7:00 a.m., September 5, 1946.

Interrogatory No. 18: State the time of the day on September 25, 1946 when the strike and stoppage of work alleged in the Second Affirmative defense ended.

Answer: Sailors strike ended midnight September 12, followed by Cook's and Steward's Strike at 12.01 a.m., September 13, ending midnight September 22, followed by a refusal to work until midday September 26.

Interrogatory No. 19: When were the remainder of the barrels of salt herring mentioned in the amended libel discharged from the Denali after termination of such strike and [60] stoppage of work on September 25, 1946?

Answer: September 25, 1946, 1:45 p.m. to 3:45 p.m.

Interrogatory No. 20: State whether any survey or inspection was made of the barrels of salt herring mentioned in the amended libel at or after

the time of discharge from the Denali at Seattle by any employee, officer, or agent of respondent; whether or not such survey or inspection was made alone or jointly with any other person; the dates of such surveys or inspections, if more than one, and the name or names of the persons making the same.

Answer: Survey was made by James Gow on September 5, 1946 and subsequent dates. Respondent also understands that Libelant had a surveyor present.

Interrogatory No. 21: If a survey or inspection was made as stated in Interrogatory No. 20, state whether the salt herring mentioned in the libel was found to be in a damaged condition, and the apparent cause thereof, such as freezing, exposure to heat, contamination, or other cause.

Answer: The survey states:

“Inspection of these herring showed the flesh of the fish soft, the brine oily, and the valueless fish in the first stage of decomposition. * * *

“There are a number of conditions which could cause the conditions found, fish being held too long before packing, due to congestion at the cannery, improper curing and preparation and the barrels being subjected to warm conditions.

“We attribute this damage to inherent quality of the commodity prior to shipment, there being no conditions in our opinion wherein the carrier caused or contributed to the damage found.”

Interrogatory No. 22: State whether any inspection or survey was made of the salt herring men-

tioned in the amended libel [61] by respondent or anyone on its behalf at or about the time such salt herring was delivered to the Denali at Port Wakefield, Alaska.

Answer: No inspection was made of the herring at the time of loading. It was sealed in barrels.

Interrogatory No. 23: If respondent's answer to Interrogatory No. 22 was "yes", state the nature and extent of such inspection and what such inspection revealed as to the condition of such salt herring.

Answer: No inspection was made, nor is it customary for the ship to inspect such cargoes.

/s/ J. CHARLES DENNIS,
United States Attorney, Proctor for Respondent,
United States of America.

/s/ BOGLE, BOGLE & GATES.

/s/ CLAUDE E. WAKEFIELD,
Of Counsel.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 16, 1948.

[62]

[Title of District Court and Cause.]

LIBELANT'S ANSWER TO RESPONDENT'S
INTERROGATORIES

Comes now the libelant and answers the interrogatories of the respondent as required by the rules and practice of this Court and particularly as

required by order entered herein April 10, 1948 modifying the order of January 19, 1948 by overruling libelant's exceptions to the interrogatories hereinafter set forth.

Interrogatory No. 10: State from your experience what is the maximum temperature to which barrels of salt herring can be subjected before becoming damaged by such temperature.

Answer: Libelant does not know. The undersigned has been continuously engaged in the business of packing and processing salt herring from 1916 to the present time and has never experienced a loss of any kind from heat damage.

Interrogatory No. 11: At what temperature should barrels of salt herring be kept when stored to remain in sound and undamaged condition?

Answer: When herring is to be storage for long periods of time it should be kept in a cool room at temperatures in the neighborhood of 32° to 33° F. However, libelant [63] habitually stores salt herring for periods up to two months at normal outside temperatures encountered at its plant in Port Wakefield, Alaska. Libelant does not know the exact temperature range encountered at its plant in Port Wakefield, Alaska during the herring season, but alleges that it ranges approximately from a high of 66° to a low of 44°.

Interrogatory No. 12: For how long would a barrel of salt herring have to be subjected to the temperature mentioned in Interrogatory No. 11 to become damaged?

Answer: Libelant does not know.

Interrogatory No. 15: Is salt herring shipped from Seattle to New York or other east coast cities and, if so, how is it shipped (by rail or boat) and is it afforded refrigeration during such shipment?

Answer: Salt herring is shipped from Seattle to New York and other east coast cities by rail. In the winter time no refrigeration is required; in the summer refrigeration is always required.

Interrogatory No. 16: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage.

Answer: Libelant believes that the subjection of salt herring in barrels to heat of 70° for one week would damage it and render it unfit for food.

Interrogatory No. 17: State the maximum daily temperatures at Port Wakefield, Alaska between August 1, 1946 and [64] August 24, 1946 and state whether on each day it was clear, cloudy or rainy.

Answer: Libelant kept no record and cannot answer interrogatory No. 17, except that the weather was the same as usually encountered at Port Wakefield during the season in question. At the request of libelant the United States Department of Commerce, Weather Bureau, has furnished a statement of weather conditions at Kodiak, Alaska, the nearest point where weather observations are made to Port Wakefield, Alaska. Copies of this document and the explanatory letter of the

Weather Bureau are attached hereto and incorporated in this answer by reference.

LEE H. WAKEFIELD.

(Duy Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 22, 1948.

[65]

United States Department of Commerce
Weather Bureau

Climatological Section
Anchorage, Alaska
April 9, 1948

Edward M. Hay and David O. Hamlin,
Lawyers,

Colman Building
Seattle 4, Washington.

Dear Sirs:

In reply to your letter of April 7, 1948, requesting meteorological data from Port Wakefield, Alaska, we do not have weather reports from this location. Reports from Kodiak, Alaska, are the nearest to this location that we have available, a copy of which is being enclosed.

Under conditions that prevailed during this season, temperatures would not likely differ more than five degrees; winds would be similar in velocity but might differ considerably in direction; days with precipitation would largely be the same, but amounts could differ considerably; and the cloudiness would be nearly identical to the conditions at Kodiak.

Very truly yours,

OTTIS C. BOBBITT,
Climatological Supervisor. [66]

[Title of District Court and Cause.]

LIBELANT'S AMENDED ANSWER TO
RESPONDENT'S INTERROGATORY No. 10

Comes now the libelant and amends its answer to respondent's Interrogatory No. 10 as follows:

Interrogatory No. 10: State from your experience what is the maximum temperature to which barrels of salt herring can be subjected before becoming damaged by such temperature.

Answer: Libelant does not know. The undersigned has been continuously engaged in the business of packing and processing salt herring from 1916 to the present time and has never experienced a loss of any kind from heat damage prior to the loss alleged in the libel herein.

Libelant alleges that this amendment is made necessary by an inadvertent omission of its prior answer to such interrogatory.

LEE H. WAKEFIELD. [68]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed June 17, 1948. [69]

[Title of District Court and Cause.]

COURT'S DECISION

Before: The Honorable John C. Bowen, District Judge.

Seattle, Washington, July 22, 1948—2:00 p.m.

* * * *

The Court: Much of the law which libelant has cited in support of the libelant's position in this

case is applicable to cargo not concealed in sealed containers. In the case at bar the cargo of mild salt cured herring was contained in sealed barrels continuously from the beginning of the curing process in Alaska until the cargo was discharged from the ship [70] at Seattle, except when each barrel was opened to check brine and add more herring to take up shrinkage.

The Court is not convinced from the evidence that any thorough inspection of the cargo was ever made from the time the herring was first put in the barrels until the cargo was discharged from the ship at Seattle, although the witness Wakefield in effect testified that the condition of the herring already in the barrels was always observed when they were checked for shrinkage and supplied with additional herring to fill up the shrinkage during the curing process, and that the herring in question was subjected to that check up.

The witness Wakefield gave detailed testimony as to the history of this cargo and its care and conditioning. He testified as to the delivery from the fishing boats of fresh herring at his saltery at Port Wakefield. He testified as to the culling out of bad fish and as to the care and attention given the fresh herring preparatory to subjecting it to the curing process. He testified to the care and attention given to the placing of the fresh herring in these barrels and of the introduction of brine and of the sealing of the barrels, and of the later opening of the barrels, draining off part of the brine and adding additional fish to take up the [71]

shrinkage. In effect he testified that the same care and grading of the herring in selecting sound and merchantable herring for the salt curing process were applied in this case as had been usually practiced at his saltery and that the same saltery process was applied to this shipment of herring, the same curing process, the same treatment of opening the barrels, draining off part of the brine before the salt curing process was completed, and of adding more fresh herring to the barrels to take up the shrinkage, just as had been done in other salt curing processes at this plant, and that this salting process of this particular cargo was according to his usually practiced method.

There was no testimony to contradict that testimony that the salt herring contained in these barrels, and the subject of litigation, was the same kind of merchantable salt herring which this libellant had produced at the same saltery and shipped in other shipments at other times. There is no evidence to the contrary. Therefore, it seems to me that the Court must accept as true the testimony adduced by witness Wakefield as proof of the fact that this herring was, when it was received on board the ship at Port Wakefield, Alaska, as a matter of [72] fact in apparent good order and condition.

It may be as contended by respondent that the recitation in the bill of lading of "apparent good order and condition" should, in view of the fact that this cargo was in sealed containers, be applied as a matter of law only to the outward appearance

of those containers rather than to the cargo contained in the containers. Accepting for the moment, for the purpose of considering the point, that such is the effect and the only effect of such recitation in the bill of lading, still the Court finds, concludes and decides from a preponderance of the evidence, here introduced as to the process I have already referred to, and as to the care and attention given to the curing process as shown uncontradicted by all of the evidence upon that point in this case, that the condition of the contents of these barrels (and not merely the outward condition of the barrels themselves) was in fact in good order and condition when received on board this ship. There is nothing in the circumstance of storing some of the barrels containing some of the cargo on the face of libelant's dock at Port Wakefield for a few days awaiting the arrival of the ship which compels the inference that the contents of the barrels must have been damaged by [73] reason merely of being stored for those few days on the face of that dock, in view of the favorable weather conditions for outside temporary storing of this kind of cargo at that season.

By a preponderance of the evidence it was further established that some of this cargo where it was stowed in the respondent's ship, either in number 3 lower hold or in number 4 lower hold, was stowed in the space between the shaft alleys inside of which ran certain steam pipes, and that in that hold space there was an 80-degree Fahrenheit temperature 15 hours after the cargo had been dis-

charged and only about five hours after a strike became effective and all hands left the ship. It may reasonably be inferred that the ship's machinery—that which might produce heat in the hold as well as that which might cool the heat out of the hold—had been shut down at the time the strike became effective. However, it seems to the Court that the inference is compelling that there were an excessive temperature and heat in that cargo space at and before the time of the discharge of this cargo, and that such excessive temperature and heat caused the cargo damage here complained of. There was some oral testimony to the effect that while the unloading of [74] the herring was in progress some heat about the shaft alleys was noticeable, although there was some oral testimony to the contrary.

The Court finds that at and before such time of discharge such temperature in the hold was excessive notwithstanding the fact that the respondent adduced testimony tending to show that inspections were made of the temperature in the hold at intervals during the voyage while the cargo was aboard respondent's ship and found no excessive temperature in the hold at the time the inspections were made, and notwithstanding other testimony that at another or other times no excessive heat was found by others of respondent's witnesses.

The Court also has considered the evidence now before the Court in the form of Libellant's Exhibit 16 which establishes among other facts that other cargos of this same character and cargoes of perishable and semi-perishable nature had previously

been successfully carried in this cargo space, and further that on this same voyage cargo of this very same kind was successfully carried, without experiencing damage, from another Alaskan port, namely, Port Vita, to the same port of destination as that at which libelant's cargo was discharged. But Libelant's [75] Exhibit 16 discloses the fact that the Port Vita shipment was stowed not in numbers 3 or 4 holds but in number 1 lower hold.

The evidence does not affirmatively show in number 1 hold conditions different from those in numbers 3 and 4 respecting machinery or heating pipes or heat transmitting pipes which might cause any difference in temperature; but counsel for libelant has argued there were not, and the evidence does not indicate that there were, any heating pipes or steam pipes running through or alongside or anywhere near that number 1 hold space, because it is forward of the engine room and not aft of the engine room.

As already indicated, the Court concludes that by a preponderance of the evidence it is established that the contents of these barrels of salt cured herring were received on board this ship at Port Wakefield at the beginning of this voyage in good order and condition, and that, the libelant having established that fact, the burden in this case shifted to respondent to prove by a preponderance of the evidence that nothing occurred in the course of the voyage which did actually damage or might reasonably have been expected to damage this shipment, or that that damage was caused by in herent vice

of the contents [76] of the barrels. This burden respondent has not sustained. Instead, the preponderance of the evidence compels the Court to find and conclude that the damage to the contents of these barrels of salt cured herring resulted proximately from excessive heat in numbers 3 and 4 holds because of improper stowage and lack of care of the ship's cargo space, particularly holds 3 and 4, during the voyage and before discharge of the cargo on or before the 4th day of September, 1946, although the damage may have possibly increased in degree during the strike after that date, but, if so, the amount of such increase if any is not ascertainable from the evidence now before the Court.

For the reasons stated the Court does find, conclude and decide this case in favor of the libelant and against the respondent for the difference in the market value of this cargo at Seattle, if it had there been in like condition as when shipped, and its actual condition in which it was when there discharged, plus the normal and necessary charges expended in connection with this shipment which would ordinarily have been experienced in connection with the normal movement of any other similar shipment under like circumstances in moving such a shipment at [77] the Port of Seattle. As to those expenses, if there are any further questions the Court will consider them upon the request of counsel.

Concluded.

[Endorsed]: Filed June 29, 1948.

[78]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly for trial before the undersigned District Judge on July 13, 1948 and thereafter, Libelant appearing in person and by David O. Hamlin and Axel C. Julin, of proctors for Libelant; Respondent appearing by Claude E. Wakefield and M. Bayard Crutcher of Bogle, Bogle & Gates, of proctors for Respondent; witnesses having been sworn and heard, evidence received and the cause having been fully argued; the Court having duly considered all matters involved herein and having heretofore announced its oral decision; now, therefore, in accordance with said oral decision the Court makes the following

FINDINGS OF FACT.

I.

At all times hereinafter mentioned Apex Fish Company, Libelant herein was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington having its principal office and place of business at Seattle, King County, Washington, within the above judicial district and has paid all license fees.

II.

That Lee H. Wakefield and Laverne E. Wakefield are [79] residents of Seattle, King County, Washington and at all times since January 13, 1947 have been and now are the duly designated, elected

and qualified trustees of the said corporation and of all of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

III.

That at all times herein mentioned the Respondent, The United States of America, was and still is a sovereign power which has by law consented to be sued herein.

IV.

That at all times material to the Libel the Respondent, The United States of America was the owner and operator of the steamship "Denali" and was the carrier of the cargo hereinafter mentioned.

V.

That at all times herein mentioned said vessel was either a public vessel of the United States of America or employed by the Respondent as a merchant vessel and in either event was operated by or on behalf of the Respondent as a common carrier of merchandise for hire.

VI.

That if said vessel had been privately owned or possessed at the time of filing and service of the Libel herein, a proceeding in admiralty in rem and in personam could have been maintained against said vessel and against her owner by Libelant for the loss and damage alleged in the Libel as amended; that Libelant has elected to proceed upon the principles of both a libel in personam and a libel in rem. [80]

VII.

That the steamship "Denali" was at the time of the service and filing of the original libel herein within this district and within the jurisdiction of this court.

VIII.

That on August 23, 1946 Libelant delivered to Respondent at the port of Port Wakefield, Alaska certain merchandise in good order and condition, to-wit: 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1129 half barrels of medium salt herring to be carried from said port of shipment to the port of Seattle, Washington and there to be delivered in like good order and condition as when shipped to the order of James Farrell & Company in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the Warship short lading Form then and there signed and delivered to said shipper by the duly authorized agent or representative of the Respondent.

IX.

That thereafter Respondent loaded all the aforesaid merchandise aboard the steamship "Denali" and the vessel having on board said merchandise sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington on September 4, 1946 still having the said merchandise aboard, but not in like good order and condition as when delivered to Respondent, but damaged, destroyed and a portion thereof rendered wholly valueless; that the sole, direct and proximate cause

of such damage and deterioration of said cargo was Respondent's exposure of the same to excessive heat in lower holds 3 and 4 while in the custody of Respondent during the voyage and/or before discharge; that in so [81] exposing the said cargo and shipment of libelant to heat, respondent was guilty of negligence in the loading, handling, stowage, carriage, keeping, custody, care and discharge thereof; that there was no excuse for such negligence, nor were there any conditions nor circumstances excusing nor relieving respondent from liability for the damage caused by such negligence.

X.

That at all times material to this proceeding Libelant was the sole owner of said merchandise and the sole owner of the right to sue and recover for the damage thereto.

XI.

That 971 of said half barrels were delivered to libelant by respondent at Seattle, Washington, on September 4, 1946, and that the remaining 387 half and quarter barrels were delivered to libelant at Seattle, Washington on September 25, 1946; that the market value of said shipment of salt herring at the time and place of delivery by Respondent to Libelant in the condition in which it would have arrived, but for the carrier's fault, was \$27,876.00 computed as follows:

110 quarter barrels medium at \$13.00 each.....	\$ 1,430.00
119 half barrels large at \$23.00 each.....	2,737.00
1129 half barrels medium at \$21.00 each.....	23,709.00
	<hr/>
	\$27,876.00

That the market value of said shipment of salt herring at the time of delivery by Respondent to Libelant at Seattle, Washington in the condition in which by reason of the fault of Respondent it did arrive and the amount of salvage which was actually recovered from sale of said shipment, was \$10,329.00 computed as follows: [82]

596 half barrels medium at \$15.75 each.....	\$ 9,387.00
21 half barrels large at \$8.00 each.....	168.00
79 half barrels medium at \$8.00 each.....	632.00
22 quarter barrels medium at \$5.00 each.....	110.00
8 quarter barrels medium at \$4.00 each.....	32.00
	<hr/>
	\$10,329.00

That of said shipment 80 quarter barrels medium salt herring, 98 half barrels large salt herring and 454 half barrels medium salt herring totaling 632 in all where unfit for human consumption and valueless; that the difference between the market value of the said shipment at the time and place of delivery to libelant at Seattle, Washington in the condition in which it would have been delivered, but for Respondent's fault, and its market value in the condition in which by reason of such fault it was delivered is \$17,547.00;

That prior to its arrival at Seattle, Washington said shipment had been sold by Libelant subject to approval of condition by the buyers and was destined if accepted by the buyers to move directly from the ship to railroad cars; that solely by reason of its damaged and deteriorated condition said shipment was rejected by the buyers thereof upon its arrival in Seattle; that as a direct and proximate result of the damaged and deteriorated

condition of said cargo caused by the fault of Respondent Libelant incurred normal and necessary expense in the care, culling, storage and preservation of said shipment and in the surveying of said damage over and above the charges said shipment would have incurred, but for the fault of Respondent, in the reasonable amount of \$1236.92.

XII.

That Libelant has fully performed all of the terms and conditions of said contract of carriage by it to be done [83] or performed.

XIII.

That this action is brought under the Act of March 9, 1920 known as the Suits in Admiralty Act and also Chapter 95, 41 Statutes at Large, 525, 46 U.S.C., Section 741 to 752, inclusive, and also pursuant to and by virtue of authority given in the Suits in Admiralty (Public Vessels) Act of March 3, 1925, Chapter 428, 43 Statutes at Large 1112, 46 U.S.C., Section 781 to 790, inclusive; and such proceeding is within the admiralty and maritime jurisdiction of the United States and of this Court.

To the foregoing Findings of Fact, the Respondent excepts and such exception is allowed.

Done In Open Court this 2nd day of August, 1948.

/s/ JOHN C. BOWEN,
District Judge.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

1. That the respondent was negligent in the stowage and care of the cargo of salt herring here in suit and that such negligence was the sole and proximate cause of the damage thereto and to the libelant herein.

2. That libelant have and recover judgment against the Respondent, United States of America, in the sum of \$18,783.92, together with its costs and disbursements to be taxed herein.

To the foregoing Conclusions of Law the Respondent [84] excepts and such exception is allowed.

Done In Open Court this 2nd day of August, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

DAVID O. HAMLIN,
Of Proctors for Libelant.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 2, 1948.

[85]

In the District Court of the United States for the
Western District of Washington,
Northern Division.

In Admiralty No. 15091

APEX FISH COMPANY,
a corporation,

Libelant,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

JUDGMENT AND DECREE

This Matter having come on regularly for trial before the undersigned District Judge on July 13, 1948 and thereafter, Libelant appearing in person and by David O. Hamlin and Axel C. Julin, of proctors for Libelant; Respondent appearing by Claude E. Wakefield and M. Bayard Crutcher of Bogle, Bogle & Gates, of proctors for Respondent; witnesses having been sworn and heard, evidence received and the cause having been fully argued; the Court having duly considered all matters involved herein and having heretofore announced its oral decision, and having heretofore entered herein its Findings of Fact and Conclusions of Law; now, therefore, in accordance therewith it is

Ordered, Adjudged and Decreed that the Libelant, Apex Fish Company, have and recover judgment against Respondent, The United States of America, in the sum of \$18,783.92, together with interest thereon at 4% per annum from the 2nd day of August, 1948, together with its costs herein

taxed in the sum of \$64.50; ~~that the said judgment bear interest at the rate of 4% per annum for the period provided by law.~~ [J.C.B.]

Done In Open Court this 2nd day of August, 1948.

JOHN C. BOWEN,

District Judge. [86]

Presented by:

DAVID O. HAMLIN,

Of Proctors for Libelant.

Entered on Admiralty Docket Aug. 2, 1948.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 2, 1948. [87]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judges of the Above Entitled Court:

Respondent, United States of America, in the above entitled cause, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Bogle, Bogle & Gates and Claude E. Wakefield, of Counsel to the said United States Attorney, being aggrieved by that certain final order, to-wit, the judgment and decree filed and entered in the above cause on August 2, 1948, hereby claims an appeal therefrom and from the whole thereof, to the United States Circuit

Court of Appeals for the Ninth Circuit, and prays that such appeal be allowed forthwith.

Dated this 25th day of October, 1948.

J. CHARLES DENNIS,
United States Attorney.
BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[88]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY RESPOND-
ENT UNITED STATES OF AMERICA

Respondent, United States of America, hereby assigns error in the trial and proceedings before the Court and in the Findings of Fact and Conclusions of Law and Judgment and Decree entered and filed on the 2nd day of August, 1948, as follows:

1. That the Court erred in awarding to the libellant recovery in this action and entering judgment and decree in the sum of \$18,783.92, together with costs, or any other sum for recovery.

2. That the Court erred in making and entering Finding of Fact VIII in respect of finding that the shipment as received by respondent on board the S.S. Denali at Port Wakefield, Alaska on or about August 23, 1946 was then in good order and condition.

3. That the Court erred in making and entering Finding of Fact IX in respect to the following findings:

(a) That shipment was not delivered by respondent to libelant in like good order and condition as when received by respondent;

(b) That shipment was damaged, destroyed or deteriorated by reason of exposure to excessive heat in lower holds No. 3 and No. 4 during the voyage in question and before discharge from the vessel;

(c) That shipment was exposed to excessive heat or any undue heat while on board respondent's Steamship Denali; [89]

(d) That respondent was negligent in any respect concerning the loading, stowage, care, custody or discharge of the shipment in question;

(e) That shipment was damaged at all while being carried on board respondent's Steamship Denali;

(f) That there were no conditions nor circumstances shown by the evidence excusing nor relieving respondent from liability to libelant.

4. That the Court erred in making and entering Finding of Fact XI in respect of finding that the damaged or deteriorated condition of the shipment after discharge was in any respect due to any fault or negligence of respondent and that libelant was damaged in the sum of \$17,547.00, or any other sum, and that expenses of \$1,236.92 were reasonably incurred by libelant as a result of any fault or negligence of the respondent.

5. That the Court erred in making and entering Finding of Fact XII in respect of finding that libelant delivered sound, good, sufficient or proper shipment of barrels of herring to respondent for carriage from Port Wakefield, Alaska to Seattle, Washington.

6. That the Court erred in making and entering Conclusion of Law I that respondent was negligent in the stowage and care of the shipment and that such negligence was the proximate cause of damage thereto.

7. That the Court erred in making and entering Conclusion of Law II, that libelant have judgment against respondent for \$18,783.92, or any other sum.

8. That the Court erred in failing and refusing to find that libelant failed to sustain the burden of proving that the shipment of barrels of herring in question were in good order and condition when delivered to respondent in respect to concealed damage [90] to the mild cured herring contained in the barrels.

9. That the Court erred in failing and refusing to find that the shipment of barrels of herring in question was not in good order and condition when received by respondent from libelant, in that the barrels of herring, or some of them, were then spoiled and unfit for human consumption, or were then in such improper or deteriorated condition as to become spoiled and unfit for human consumption under proper conditions of ordinary stowage on the voyage in question.

10. That the Court erred in failing and refusing to find that No. 3 and No. 4 lower holds of the Steamship Denali between the shaft alleys where the shipments in question were stowed were then proper cargo spaces for the ordinary stowage of barrels of mild cured herring, and that the stowage afforded by respondent under the contract of carriage was proper stowage for the voyage in question.

11. That the Court erred in failing and refusing to find that there was no excessive heat or undue or improper heat in No. 3 lower hold between the shaft alleys in respect of the cargo of libelant under the contract of carriage not calling for cold storage or cool room stowage.

12. That the Court erred in failing and refusing to find that there was no excessive heat or undue or improper heat in No. 4 lower hold between the shaft alleys in respect of the cargo of libelant under the contract of carriage not calling for cold storage or cool room stowage.

13. That the Court erred in failing and refusing to find that respondent was not negligent in any respect in connection with the loading, stowage, care, custody and discharge of the shipment in question.

14. That the Court erred in failing and refusing to find [91] that the sole and proximate cause of the damaged and unfit condition of the shipment in question was the inherent vice of the shipment of mild cured herring in ordinary stowage on the voyage in question as contracted for by libelant,

and that no fault or negligence of respondent, or its Steamship Denali, caused or contributed to the damage.

15. That the Court erred in failing and refusing to find that the damage to the portion of the shipment stowed in No. 4 lower hold (to-wit, 183 half barrels—medium; 94 half barrels—large; and 110 quarter barrels) resulted solely and proximately from the unavoidable delay in discharge of said hold due to the strike effective between September 5, 1946 and December 25, 1946, for which respondent is not liable within the bill of lading exceptions and Section 4(2)(j) of the Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304).

J. CHARLES DENNIS,
United States Attorney.
BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[92]

[Title of District Court and Cause.]

ORDER GRANTING PETITION
FOR APPEAL

The above entitled cause having duly and regularly come on for hearing before the above entitled court, the undersigned Judge persiding, upon petition for appeal of respondent United States of America duly presented to this court, together with

the said respondent's assignment of errors heretofore filed with the Clerk of this court, and the court having considered the same; now, therefore

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed on the 2nd day of August, 1948 in the above entitled cause, be and the same is hereby allowed.

It Is Further Ordered that the respondent United States of America is not required to file cost and supersedeas bond on appeal, and that stay of execution is hereby entered and granted.

Done In Open Court this day of October, 1948.

.....,

United States District Judge.

Presented by:

CLAUDE E. WAKEFIELD,
Of Counsel to the
United States Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[93]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service and receipt of a copy of the Petition for Appeal and Assignment of Errors in the above entitled cause upon appeal to the United States

Court of Appeals for the Ninth Circuit, all of which have been filed in the above entitled court and cause, and service of copy of the Order Granting Petition for Appeal and allowing said appeal, and of the Citation on Appeal are hereby acknowledged as of this day.

Dated this 25th day of October, 1948.

EDWARD M. HAY,

and

DAVID O. HAMLIN,

Proctors for Libelant.

[Endorsed]: Filed Oct. 25, 1948.

[94]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF EXHIBITS TO
THE UNITED STATES COURT OF APPEALS

The parties to this cause having stipulated for the transfer of all exhibits introduced and admitted in evidence at the trial of the above entitled cause to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, as part of the certified Apostles of Appeal in the above cause, except as to libelant's Exhibits Nos. 1, 2 and 3, and good cause appearing therefor, it is, hereby

Ordered that the Clerk of this court transfer to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, all of the original exhibits introduced by the parties at

the trial of the above action and admitted in evidence, except libelant's Exhibits Nos. 1, 2 and 3.

Done In Open Court this 25th day of October, 1948.

JOHN C. BOWEN,
District Judge.

[Endorsed]: Filed Oct. 25, 1948.

[95]

[Title of District Court and Cause.]

PRAECIPT FOR APOSTLES ON APPEAL

To the Clerk of the Above Entitled Court:

You will please prepare, certify and file with the United States Court of Appeals for the Ninth Circuit at San Francisco, California, Apostles on Appeal in the above cause, including therein the following:

1. Caption of the case.
2. Names and addresses of parties and proctors.
3. Libel.
4. Answer to libel and twenty-one interrogatories annexed thereto.
5. Order on libelant's exceptions to respondent's interrogatories.
6. Libelant's answer to respondent's interrogatories.
7. Amended libel.
8. Answer to amended libel.
9. Libelant's interrogatories propounded to respondent.

10. Order on respondent's exceptions to libelant's interrogatories.

11. Libelant's request for admissions under Admiralty Rule 32-B.

12. Respondent's answer to libelant's interrogatories. [96]

13. Respondent's answer to demand for admissions under Admiralty Rule 32-B.

14. Libelant's further answer to respondent's interrogatories (pursuant to order of court April 10, 1948—Item 10 *supra*).

15. Libelant's amended answer to respondent's interrogatory No. 10.

16. All testimony offered in evidence on behalf of the libelant.

17. All exhibits offered in evidence on behalf of the libelant and admitted by the court, except libelant's Exhibits Nos. 1, 2 and 3.

18. All testimony offered in evidence on behalf of the respondent, including deposition of Arney Burns and respondent's Exhibits A-1, A-2, A-3, A-4, A-5 attached thereto.

19. All exhibits offered in evidence on behalf of respondent and admitted by the court.

20. Opinion of the court entered July 22, 1948.

21. Findings of Fact and Conclusions of Law entered and filed August 2, 1948.

22. Final judgment and decree entered and filed August 2, 1948.

23. All notices, motions, stipulations, orders and other papers related to the appeal to the Circuit

Court of Appeals for the Ninth Circuit, including the following:

1. Petition for appeal.
2. Assignment of errors.
3. Order allowing appeal.
4. Citation.
5. Acknowledgment of service of petition, order, assignment of errors and citation. [97]
6. Order transferring original exhibits to the Court of Appeals for the Ninth Circuit.
24. Endorsements or notations of dates of service and filing of all papers included in the said Apostles.
25. This praecipe.

J. CHARLES DENNIS,
United States Attorney.
BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel,
Proctors for Respondent.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[98]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 98, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the Reporter's Transcript of Proceedings, the original of which is sent up as a part of this record, and the original exhibits, constitute the apostles on appeal from the Judgment and Decree of the United States District Court for the Western District of Washington filed and entered August 2, 1948, to the United States Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparing record on appeal herein, to wit:

98 pages at 10 cents (copies furnished), \$9.80; petition for appeal, \$5.00; total \$14.80.

I further certify that the costs of this record on appeal have not been paid to me for the reason that said appeal is being prosecuted by the United States of America.

I further certify that there is attached hereto the original citation on appeal issued in said cause.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District

Court at Seattle, in said District, this 30th day of November, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk.

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the above named Libellant, Apex Fish Company, a Corporation,

Greetings:

You are hereby notified that in that certain cause in Admiralty in the United States District Court for the Western District of Washington, Northern Division, as entitled above, wherein Apex Fish Company, a corporation, is libellant, and the United States of America is respondent, an appeal has been allowed by order of **this court to the** United States Court of Appeals for the Ninth Circuit, upon the petition of the respondent therefor.

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit in San Francisco, in the State of California, within forty (40) days from the date of this citation pursuant to an appeal allowed in the above entitled cause on the 25th day of October, 1948, to show cause, if any there be, why the final decree as entered in the above entitled cause, upon such appeal above mentioned, should

not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, this 25th day of October, 1948.

(Seal) /s/ JOHN C. BOWEN,
United States District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

In the District Court of the United States
For the Western District of Washington,
Northern Division.

No. 15091

APEX FISH COMPANY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Before: The Honorable John C. Bowen, District Judge.

Seattle, Washington

July 13th, 1948, 10:00 o'clock, a.m.

Appearances: David O. Hamlin, Esq., and Edw. M. Hay, Esq., and Axel Julin, Esq., appearing for and on behalf of libelants; Claude E. Wakefield, Esq., and M. Bayard Crutcher, Esq. (Messrs. Bogle,

Bogle & Gates), appearing for and [1 *] on behalf of Respondent.

Whereupon, the following proceedings were had and done, to-wit:

The Court: Are the parties and counsel ready to proceed with the trial of Apex Fish Company against the United States?

Mr. Hamlin: Ready, your Honor.

Mr. Wakefield: We are ready, your Honor.

The Court: The Court at this time will hear counsel from their present stations respecting their opening statements which they think should be made.

First, I will hear counsel for libelant.

(Opening statement presented to the Court by counsel for libelant.)

Mr. Wakefield: If the Court please, in view of counsel's opening statement and what he intends to prove or show in his case in chief, I think possibly my opening statement could best be reserved if that is [2] satisfactory to your Honor.

The Court: That is agreeable. Call the libelant's first witness.

Mr. Hamlin: I wish at this time to offer in evidence Libelant's request for admission number 4 reading as follows:

"That at the time of the filing and service of the original libel herein, the S.S. Denali was within the above-entitled district and within the jurisdiction of this honorable court."

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

And the answer of the respondent thereto reading as follows:

“The libel was filed July 29, 1947, and respondent is advised that the same was served upon the Attorney General of the United States, August 4th, 1947. The S.S. Denali sailed from Seattle for Alaska on July 31st, 1947 and was not thereafter in Seattle until August 18th, 1947.”

The Court: Do you have a copy of that? Let the copy be marked. I assume that the original is [3] available for inspection.

Mr. Hamlin: I was under the impression that we could offer it orally, your Honor. Is it customary in this court to have it in writing?

The Court: I am not aware of any custom. I just assumed—without thinking really—that you had copies available and did wish to introduce the physical stipulation in evidence. If that is not true, you may disregard the court’s statement.

Mr. Hamlin: The original is in the files.

The Court: It is not in evidence as such unless the rules or law give it some evidentiary effect.

Mr. Wakefield: There is no objection to the offer, your Honor.

Mr. Hamlin: May we have those marked, your Honor?

(Articles of Incorporation of Apex Fish Company, marked Libelant’s Exhibit 1 for identification.)

(Minutes of Stockholders marked Libelant’s Exhibit 2 for identification.)

(Certificate of Dissolution, Apex Fish Company, marked Libelant's Exhibit 3 for identification.) [4]

Mr. Wakefield: No objection, your Honor.

Mr. Hamlin: I offer it in evidence.

The Court: Libelant's Exhibit 1 is now admitted.

(Libelant's Exhibit Number 1 received in evidence.)

Mr. Hamlin: Call Mr. Lee H. Wakefield.

LEE H. WAKEFIELD,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your name, please?

A. Lee H. Wakefield. [5]

Q. Where do you reside, Mr. Wakefield?

A. Seattle.

Q. Are you an officer of Apex Fish Company?

A. Yes, sir.

Q. What office do you hold?

A. President and manager.

Q. Were you such an officer on January 13th, 1947?

A. Yes.

Q. Showing you what has been marked Libelant's Exhibit 2 for identification, can you tell me what that is, Mr. Wakefield?

A. It is a meeting of the stockholders of the Apex Fish Company.

The Court: Do you mean that thing is a pic-

(Testimony of Lee H. Wakefield.)

ture of a meeting or what other kind of a thing is it?

Q. (By Mr. Hamlin): Do you mean to state that that is the minutes, Mr. Wakefield?

A. Yes; it is the minutes of a meeting of the stockholders.

Q. Can you identify the signatures appended to those minutes? A. Yes, I do.

Q. Will you read them, please?

The Court: Silently, do you mean? It is [6] not in evidence as yet. Do you mean he should read it silently without speaking the words out loud?

Mr. Wakefield: If the Court please, I would like to raise no objection to the admission of this. It is a sufficient copy of the minutes.

Mr. Hamlin: Very well. I offer Libelant's Exhibit 2 in evidence.

The Court: It is now admitted and it is proper at this point or it may be proper at any other point to ask this witness to read the contents of this exhibit.

(Libelant's Exhibit 2 received in evidence.)

Q. (By Mr. Hamlin): Will you read the names of the signatures on that document, please, Libelant's Exhibit 2? A. I didn't hear you.

Q. Will you read the signatures on Exhibit 2, please?

A. Yes, sir. "Lee H. Wakefield; Laverne E. Wakefield; Howard Wakefield; and Carrol Orn.

Q. Are those all of the stockholders of Apex Fish Company? A. No.

(Testimony of Lee H. Wakefield.)

Q. Approximately what percentage does it—

A. That was all except my son who was back in Connecticut. He had a small interest. [7]

Q. About what per cent of the stock is represented in that Exhibit 2?

A. Well, it is—oh—90 odd per cent.

The Court: Do you know of any other Wakefield, other than members of your own family, being engaged in fisheries in the vicinity of Alaska?

The Witness: No, I do not except in the way of fishing. I know of a nephew of mine down at Ketchikan that is a trawler. Otherwise, there is no other Wakefield up there that I know of.

The Court: Has there been any other Wakefield connected in a proprietary manner with the fishing business in Seattle, so far as you know, other than members of your family?

The Witness: No, there is no other that I know of.

The Court: You may inquire.

Mr. Hamlin: May we have this marked, please? Libelant's Exhibit 3 is offered in evidence without objection, I understand by the respondent, it being a Certificate of Dissolution signed by more than a majority of the voting power of the stockholders of the Apex Fish Company. [8]

Mr. Wakefield: No objection, your Honor.

The Court: Admitted.

(Libelant's Exhibit 3 received in evidence.)

Mr. Wakefield: In order to facilitate further proof on Exhibits 2 and 3, the respondent admits

(Testimony of Lee H. Wakefield.)

that Lee H. Wakefield and Laverne H. Wakefield are trustees of the Apex Fish Company.

Mr. Hamlin: Will you further admit that they have qualified as such and the appointment of them has become effective?

Mr. Wakefield: Yes.

Mr. Hamlin: Thank you.

Q. (By Mr. Hamlin): Mr. Wakefield, how long have you been in the salt herring business?

A. Since 1916.

Q. In what capacity were you in that business in 1916?

A. I was president and manager of the companies that were packing the herring.

Q. Where?

A. At that time at Little Port Walter on Baranoff Island, Southeastern Alaska.

Q. How long did you remain in connection with the industry [9] in that capacity?

A. Until I think it was about 1923.

Q. During that period what were your duties in the office which you held?

A. Well, my duties were to supervise, hire the men that did the work, and also to sell the product.

Q. Did you actually go to the plant in Alaska during—

A. Every season, yes.

Q. Did you remain for any period of time or just visit?

A. Oh, I was there for quite some time during the packing season.

Q. What happened in 1923; what change occurred in your relationship?

(Testimony of Lee H. Wakefield.)

A. That was at the end of World War I when I got hit with a sledge hammer. I turned the business over to someone else.

Q. Did you go out of the herring business then?

A. No; no, I still remained.

Q. What did you do?

A. I packed herring, made oil and meal.

Q. Where was that done?

A. Red Bluff Bay, Alaska, and Port Ashton in Prince Williams Sound, Alaska.

Q. How long did you work at those two places?

A. I believe it was in '29 — '29 or '30 — I wouldn't [10] say positively now.

Q. What were your specific duties during that period?

A. Similar to what I had always done—supervising.

The Court: Did you know the man for whom the Port Ashland place was named?

The Witness: He was my partner in the early days—old Captain Ashland—Thomas.

The Court: He had no identity with an admiralty lawyer named Ashland?

The Witness: No, none whatever.

Q. (By Mr. Hamlin): Did you ever actually go into the physical work of preparing salt herring?

A. Yes, I did.

Q. When did you start that?

A. The first work I did directly in the plant was in '27.

Q. What did you do then?

(Testimony of Lee H. Wakefield.)

A. I did some gibbing, and packing, the same as the people I had hired before.

Q. What is gibbing?

A. Gibbing is taking two little fins and the main gut out of the herring. That is called gibbing—preparatory to salting.

Q. How much of it did you do? [11]

A. I didn't do any great quantity. We were up there very late that fall, and only had a few people that we kept up for the winter packing and I helped them out.

Q. When is the next time you entered into the actual work of the plant?

A. In '31 is when I took absolute charge of the entire operation.

Q. What were your duties from 1931 through to 1946, concluding that year?

A. I was curer, superintendent, manager of the plant. The curer usually had an assistant to help out, who was a cooper. Part of that time I did my own coopering, curing and the whole works—in '31 and '32.

Q. What company were you connected with at that time?

A. Apex Fish Company.

Q. Did you go to the plant during the packing season in '31 and '32?

A. I was there the entire season.

Q. How about the years after that?

A. I was always there.

Q. During each packing season?

A. Yes.

(Testimony of Lee H. Wakefield.)

The Court: What connection if any did you [12] have with the Alaska fish industry prior to 1930 and '31?

A. Well, I had a number of salmon canneries and also herring plants combined.

The Court: Beginning what year?

The Witness: Beginning in '16, is when I started at Little Port Walter. Then in '17 and '18 I bought a plant at Red Bluff Bay. In '19 I financed and then took over from Captain Ashton Thomas. I unfortunately had to take over the plant at Port Ashton in 1919.

The Court: Following that year what happened; when did you sever your connection with the Alaska fishing industry?

The Witness: I continued as president and manager of the various plants.

The Court: In 1920, '21, '22, '23 and '24?

The Witness: Yes, continuously operating.

The Court: Up to what year?

The Witness: Well, up to the present time. I have never missed a year yet.

The Court: I mean with respect to the salmon business that you said you were in.

The Witness: Well, the salmon business I [13] closed out in either '29 or 30.

The Court: That is your salmon business?

The Witness: Yes—the plants. As a matter of fact, the banks closed me out.

The Court: Have you been engaged in the herring business since that time?

(Testimony of Lee H. Wakefield.)

The Witness: Continuously since that time.

The Court: You may inquire.

Q. (By Mr. Hamlin): Do you own stock in Apex Fish Company? A. Yes, sir.

Q. Approximately what percentage of it?

A. About 68 per cent. Some years ago I give some to my children.

Q. Will you detail generally the business which Apex Fishing Company is in?

A. Well, it was salt herring—making meal and oil from herring.

Q. Apex also has a meal and oil operation, has it?

A. Yes. We have a large operation up at Port Wakefield.

Q. Where is your plant located, Mr. Wakefield?

A. The plant is located on—oh, it is about 30 miles from Kodiak on Raspberry Island. Raspberry Island lies between Afognak and Kodiak Islands. [14]

Mr. Hamlin: May we have this map marked for identification please?

(Large Map marked as Libellant's Exhibit 4 for identification.)

Mr. Hamlin: I would like to have the witness mark on that Exhibit 4 the location of his herring plant which he has here testified about. I would like to advise the court and counsel that the main reason to introduce this is to show the location of the plant in so far as it ties in with Weather Bureau Divisions.

(Testimony of Lee H. Wakefield.)

The Court: In connection with the exhibit or elsewhere in the testimony the Court suggests that you have the facts stated by oral testimony.

Q. (By Mr. Hamlin): Showing you Libellant's Exhibit 4 for identification, can you tell us what that is, Mr. Wakefield—the whole exhibit, what is that piece of paper?

A. This is a geodetic map of Alaska.

The Court: Has it a number?

The Witness: Yes, it has. "Alaska Map E."

The Court: Does it have any initials to initials [15] to indicate whether or not it is official?

The Witness: Yes. "The United States Department of the Interior, Geologic Survey."

The Court: It is not a Coast Geodetic Survey Map, is it, or is it such a map?

The Witness: Well, I think that is what it would be considered. It shows the entire Alaska.

The Court: Is that map of the usual quality of Coast & Geodetic official maps of Alaska and Alaskan waters?

The Witness: Yes, it is, on a large scale. The islands show very small here where the sailing charts are made much larger and only cover a larger area.

The Court: Mr. Hamlin, is it offered as an official Coast and Geodetic Map of Alaskan waters?

Mr. Hamlin: I was under the impression that it was a publication of the Department of Commerce. I saw nothing to tie it in with the Coast and Geodetic Survey.

(Testimony of Lee H. Wakefield.)

The Court: You may proceed.

Mr. Hamlin: I offer Libelant's Exhibit 4 in evidence.

The Court: Has opposing counsel seen it? [16]

Mr. Wakefield: I have no objection to the authenticity of the map. I do object to it as not being material. I don't see the materiality of a map of Alaska.

The Court: Do you admit that it is an official map?

Mr. Wakefield: Yes.

The Court: The objection is overruled. Libelant's Exhibit 4 is now admitted.

(Libelant's Exhibit 4 received in evidence.)

Q. (By Mr. Hamlin): Mr. Wakefield, will you mark with your pen a circle where the plant of Apex Fish Company is located on Exhibit 4?

A. I have already marked it, sir.

The Court: Thank you. That is all with that exhibit.

The Witness: There is a red circle there, where the plant is located on Raspberry Island.

(Exhibit handed to the Court.)

The Court: Near what larger island is Raspberry Island?

The Witness: It lies right between Kodiak Island and Afognak Island. They are the two large [17] islands of the group.

The Court: Court will be at recess for about fifteen minutes.

(Recess.)

(Testimony of Lee H. Wakefield.)

The Court: The witness may resume the stand and you may now proceed.

Mr. Hamlin: I offer in evidence Libelant's Exhibit 5 which bears on its face the showing that it is a United States Coast and Geodetic Map Number 8534 purporting to show Marmot Bay and Kupreanof Strait.

The Court: Is there any objection?

Mr. Wakefield: None other than it is irrelevant and immaterial, your Honor.

The Court: For what purpose do you offer the exhibit?

Mr. Hamlin: For the purpose of showing the relative locations of Kupreanof Strait, Alaska, and Afognak Island, which subsequently will be shown in the evidence to be the nearest United States Bureau weather station.

The Court: The objection is overruled.

Libelant's Exhibit 5 is admitted in evidence.

(Libelant's Exhibit 5 received in evidence.)

Q. (By Mr. Hamlin): Will you describe your plant at Port Wakefield, Alaska, as it existed in July and August, 1946, please?

A. Well, the plant was the same then as it is now.

Q. Will you tell what it looked like physically; what facilities did you have there?

A. Well, we had—the size of the buildings, if you want that?

The Court: The number of buildings, the character of buildings and plants and facilities; describe them briefly.

(Testimony of Lee H. Wakefield.)

A. (Continuing): The plant itself is all one building, you might say. The in-shore end of it is where the boiler and meal plant is, and all of the outside end—which is one hundred feet square—is where the saltery is located, in the outside end of the building. Then, of course, the small dock on the face of the building.

Q. What two operations do you carry on there?

A. Just salt herring, meal and oil.

Q. Will you please state in detail how salt herring is processed by Apex at that plant, commencing with the delivery of the fish by the fishermen at the dock?

A. Well, when the fish come to the dock either I or my assistant would be there to check and see if they [19] were suitable quality for gibbing—for packing. If they were, then we ran them through a grader up in the saltery which graded out all of the smaller size herring, leaving only the larger sizes going into what we call a gibbing hopper. Then as soon as that was done and sufficient fish were unloaded, they would call out the saltery crew and start gibbing.

Those fish were examined, of course, as I say, when they first came to the plant to see what quality they were and if suitable for packing. Then when the gibbers came out, they would sort them again as they packed into two sizes, what we call medium and large, a medium herring being a fish that ran from ten and a half inches in length and the large from ten and a half to twelve

(Testimony of Lee H. Wakefield.)

and a half or anything over we put in as large. These gibbers, as I explained before, take out the gills and the main gut, throw the fish into a big gibbing bin behind them with two compartments, one for the large and one for the medium.

As they did that, after they would gib a few, we have what we call a "rowser"—a man that does nothing but go along and throw salt over the herring and then take and rowse them up with his hands until [20] there is salt surrounding every fish. The fish being wet, of course, the salt would adhere to them.

Then after that is done these gibbers pack them into the barrels in layers. They would put in one layer one way and then the next layer would go crossways. They keep criss-crossing until the barrel is full. Then, of course, during that time either myself or my assistant is watching out to see that they are graded properly, to the proper sizes, that the right amount of salt is put on.

And after the barrel is filled, the cooper comes along and heads it up—puts the head in.

After that is done, they role it out. And the man that is called our briner bores a hole in one of the staves in about the middle of the barrel and pours in whatever brine they will take at that time, which usually runs from one-half gallon to a gallon. After that is done the bung is put back in the barrel and they are stowed away for curing.

The cure runs anywhere from seven to twelve days, depending on circumstances. They cure quite

(Testimony of Lee H. Wakefield.)

thoroughly in seven days but ordinarily we try to repack when they have been about ten days in cure. In that way we take care of all the shrinkage. In ten days they will shrink from 19 per cent to 20 per [21] cent. Usually we allow about 20 per cent for shrinkage.

At that time, after they are in cure for that length of time, when we have slack season and we are not too busy gibbing, we roll out the various days packing that are in cure the proper length of time, take the head out of the barrel, and knock out the bung so that the brine in the top half of the barrel will run out. That permits the herring to settle down about four to five inches in the barrel, which takes care of that shrinkage.

Then we take fish packed from the same day's gibbing and dump them into a big tub and those fish then are put into carts and the gibbers come along and refill these barrels and what we call putting on the topper. It takes usually three to four tiers of fish to bring the barrel up so that it is full to the top, after which they put the head back in, roll the barrel down on the side and put in whatever brine the barrel will take. Sometimes it takes only half a gallon, but whatever it will take they put in the barrel. Then, after it has been repacked and reheaded, they drive the bung home and then it is ready to ship. We roll that out, then, and pile it up ready for shipment. [22]

After that process is finished and the product is ready for shipment, and in each barrel, does each

(Testimony of Lee H. Wakefield.)

fish have on it a fishhead, or does it not have on it a fishhead?

The Witness: They all have heads on them.

The Court: Why is the fishhead left on the fish?

The Witness: I think that is more the habit of the buyer than anything else—that they are accustomed to buying originally.

Years ago we got most of the herring in from Scotland and that was the type of pack we were copying in this country was the Scotch cure and the Scotch pack. They gibbed and left the head on.

As a matter of fact, in the early days of packing they wouldn't buy fish if they had the heads on.

Now, however, they do get some with the heads on.

The Court: Do you know of any other reason, other than that historical one, why the head is left on the herring in this salting process you have discussed?

The Witness: No, I do not know any reason other than that. [23]

The Court: Would it not be easier and more efficient in the gibbing process if while the gibber is taking out those fins and the intestines as you have discussed the process previously, if you also cut off the head of the herring?

The Witness: I believe that the gibbing—taking the fins and the gills and the main gut is quicker than they could take that out and the head off.

(Testimony of Lee H. Wakefield.)

The Court: You think the gibbing process is more quickly accomplished by leaving the heads on than by taking them off?

The Witness: Yes, I believe it would be, Judge.

The Court: Proceed.

Q. (By Mr. Hamlin): You mentioned that when you went down to the fisherman's boat you made some segregation based on quality. Upon what do you base that segregation of the fish?

A. Well, as to the fatness of the fish and whether or not it had feed in it and the size. If there is not enough of a size suitable for packing, we would let them go straight through into the meal plant—into the big tanks back by the meal plant. If [24] there were enough of the sizes suitable for packing, then we would run them through this grader and grade out the larger sizes and start gibbing.

Q. Does it make much difference as to the time after the fish is caught before it is packed?

A. Yes, it makes a lot of difference. If the fish are caught too far away and have been in a storm or anything like that, and the fish are all washed up, we never attempt to pack them.

Q. How long a period would amount to too much time after the fish is caught?

A. Oh, if they are not churned up, as I explained, fish would be in good condition eight to ten hours after they are caught, before they come to the plant.

Q. How can you tell how long it has been since they were caught?

(Testimony of Lee H. Wakefield.)

A. Well, you can tell easily. Of course, in the first place we know all of the areas that the boats are fishing. We are in touch with them constantly with radio. We know just how long it takes them to come in. And by the look of the fish—if the fish are old they are soft and mushy. It is almost impossible to gib one when it is soft and mushy.

The Court: What did you mean by the phrase “all washed up”? [25]

The Witness: If a boat is in a storm and rolling around, these fish will slide down one side to another and wear all the scales off. They get very floppy and mushy from the motion of the vessel.

The Court: Is that condition what you referred to by the phrase “all washed up”?

The Witness: Yes, that is right.

The Court: Proceed.

Q. (By Mr. Hamlin): Is this method of packing salt herring that you have referred to a standard method or is that peculiar to your own company?

A. That is a standard method.

Q. How long have you used that method?

A. Since I started into the game in 1916.

Q. Calling your attention to the 1358 barrels of salt herring involved in this proceeding, will you kindly state the dates on which the fish in those 1358 barrels were packed and the number of half barrels packed each day?

A. I think I can give you that. On the 24th day of July, we packed 225 half barrels.

Mr. Hamlin: May it please the Court, I have a list. [26]

(Testimony of Lee H. Wakefield.)

The Court: Do you wish to mark the list for identification?

(Bill of Lading marked Libelant's Exhibit 6 for identification.)

(List marked Libelant's Exhibit 7 for identification.)

Mr. Hamlin: I offer in evidence Libelant's 6, Bill of Lading, covering the shipment in suit herein.

Mr. Wakefield: No. objection.

The Court: Admitted.

(Libelant's Exhibit 6 received in evidence.)

The Court: Is it a fact that that bill of lading covers the Libelant's entire shipment here in question?

Mr. Hamlin: Yes, Your Honor.

The Court: Proceed.

Q. (By Mr. Hamlin): Will you proceed with your statement, Mr. Wakefield?

A. Then on the 26th of July—— [27]

The Court: Is that next after the 24th?

The Witness: On the 25th, 102; on the 26th, 100; on the 27th, 74.

The Court: Do you mean 74 barrels?

The Witness: 74 half-barrels on that day. Then we skipped the 28th, the 29th, and the 30th,—had no fish in at that time. On the 31st we packed 78 half-barrels. On the first of August we packed 24 half-barrels; nothing on the 2nd. On the 3rd of August we packed 252; the 4th, 29; the 5th, 23; the

(Testimony of Lee H. Wakefield.)

6th, 155; the 7th, 125; the 8th, 43; the 9th, 278; and on the 10th, 53.

Those are the fish that were repacked into the shipment that is in question.

Q. (By Mr. Hamlin): I note that the figures you have read totaled 1351 half-barrels. Can you account for the difference between that figure and the 1358 which you actually shipped?

A. That is accounted for by the shrinkage in cure, while they were curing.

The Court: And the number of one-half barrels was what?

Mr. Hamlin: 1358 except that there are——

The Court: Let it be established by the [28] testimony rather than by the statement of counsel.

Will the witness state the fact if he knows it?

How many were shipped on board the vessel?

The Witness: I don't have that lading here. I turned it over to counsel. The amount stated, however, I am very sure is correct from the lading. There were 110 quarter-barrels, I know, in the shipment.

The Court: The bill of lading, Libellant's Exhibit 6, which has been admitted in evidence, lists 110 quarter salt herring, 119 half barrels large salt herring, and 1129 half barrels medium salt herring.

Are those the ones referred to as having been shipped according to the claim of libellant?

The Witness: Yes, sir; that is correct.

The Court: How many does it total; does that total 1358?

The Witness: I believe that is correct, Judge.

(Testimony of Lee H. Wakefield.)

Q. (By Mr. Hamlin): Do you have libelant's Exhibit 7 before you, Mr. Wakefield?

A. Yes, sir. [29]

Q. Will you kindly state where the figures appearing on Libelant's Exhibit 7 were obtained?

A. From the pack records in our office.

Q. Did you keep those records yourself?

A. No. We had a bookkeeper to keep the records.

Q. I mean, did you make the original pack records? A. Yes, I did.

Q. Did you superintend the preparation of that Exhibit 7 that has that information appearing on it?

A. Yes, I did.

Q. Did you take it from those pack records?

A. Yes, sir.

Mr. Hamlin: I offer Libelant's Exhibit 7.

Mr. Wakefield: There is no objection, Your Honor.

The Court: Admitted.

(Libelant's Exhibit 7 received in evidence.)

Q. (By Mr. Hamlin): Did you put any dates on these barrels that you talked about?

A. Yes. They were all stenciled on both ends.

Q. What was on the top?

A. The top of the barrel was "Alaska Fat Herring, Wakefield Brand."

And then the size was stencilled in, whether [30] it was medium or large, and on the lower part of the stencil was the net weight on the barrel and "Apex Fish Company."

(Testimony of Lee H. Wakefield.)

Q. What was on the bottom?

A. A diamond "W" stencilled on the bottom.

Q. Did you make any record of the date that these barrels were put up, on the barrel itself?

A. Always, yes. They use a blue crayon to mark the date they are packed and the number of the girl that gibs that particular barrel.

Q. Where is that mark put?

A. That is put on the bottom of the barrels.

The Court: Are the gibbers usually Alaska native women?

The Witness: No. Most of them are taken from Seattle. The majority of the gibbers do nothing but gib herring. They make enough during the summer——

The Court: Is there enough among Seattle residents to whom this gibbing work appeals or does it appeal to any and all women who wish to have employment in the canneries?

The Witness: It is mostly Norwegian and Scotch people that follow that work. '

The Court: You may inquire. [31]

Q. (By Mr. Hamlin): What was your maximum daily packing capacity in the salt herring division of your plant during the period from July 24th to August 10th which you have just mentioned?

A. Well, our daily capacity would be around 300 half-barrels, with the number of gibbers I had.

Q. These dates which you have given us, starting with July 24th, indicate that approximately one

(Testimony of Lee H. Wakefield.)

month elapsed during which some of these fish were held at your plant and that others were held for progressively less periods as we come into August.

Now, is this period of one month unusually long in your operation up there?

A. No. That was about normal.

Q. Have you ever held it for longer than that?

A. Yes, we have.

Q. Up to what period?

A. Oh, I think we have held them for at least a month and a half.

Q. During what time of the year?

A. During the summer.

Q. Have you ever had any damage apparent from holding fish at the plant?

A. None whatever.

Q. Now, this method of packing which you have detailed,— [32] when I asked you to start at the fisherman and the boat and go on up, is that the way you packed these 1358 half-barrels?

A. Yes.

Q. What part did you personally take in the packing of these 1358 half-barrels?

A. I was usually out in the plant a good portion of the time. When I wasn't there, my assistant was watching over it.

Q. Did you ever go down and meet the fishermen when they brought the fish in?

A. Oh, frequently.

Q. For this shipment?

(Testimony of Lee H. Wakefield.)

A. On every shipment,—practically all during the packing season.

Q. Approximately what percentage of the time would you say that you met the boats which brought in this particular shipment?

A. Oh, I think at least 50 per cent of it I would meet the boats.

Q. Did anyone go down in your absence?

A. Yes. My assistant curer would also go down. If the boat came in late at night and I didn't want to get up, they would go and get the curer to inspect it before they started to unload. [33]

Q. Who was your curer?

A. A man by the name of Jake Frasier.

Q. How long has he been in this business of packing salt herring?

A. Practically all of his life. He was a curer in Scotland before he came to this country.

Q. How long has he worked for you?

A. I think for about seven or eight years.

Q. This repacking you have talked about—I am referring specifically now to the shipment in suit herein—was repacking done every day or was it affected by other factors up there?

A. No. Repacking isn't done every day. It is usually done when you have no fish in for gibbing. And fish that are cured sufficiently so that they could be repacked would be done when there is a slack day on gibbing and packing.

Q. I notice on Libelant's Exhibit 7 that during the last six days before August 23rd you only

(Testimony of Lee H. Wakefield.)

packed seven barrels of fresh herring—seven half barrels—what was your crew doing during that period?

A. They were probably waiting for a storm to go down so they could go out and catch the fish.

Q. Were they idle during all of that time? [34]

A. Yes. My crew in the saltery would be busy repacking during that time, just prior to the time we expected a steamer.

Q. What did you mean when you said that somebody was idle during that time?

A. I meant the fishermen were idle. During the storm the fishermen can't fish and that is why we were idle all of those days without any fish. During that time then we tried to catch up on repacking and get as many ready for shipment as we can.

Q. Did you participate in that repacking during those days?

A. Always, yes.

Q. Were any spoiled or deteriorated fish found during that repacking period?

A. None whatever,—not one.

Q. Going back to the gibbing operation for just a moment. Is any inspection or segregation of the fish based on quality made by the gibber? I mean assume that they found a fish that was soft or spoiled, what is done with it?

A. They are all instructed and do throw away any fish that is bruised from unloading or anything of the kind. They do not gib that kind of a fish. As a matter of fact, sometimes they will pick up a fish [35] and gib it before they notice that it has

(Testimony of Lee H. Wakefield.)

been cut by the elevator. They throw that down and it goes on back to the meal plant.

Q. Is there some facility available to them at the table there so that they can dispose of that fish to the meal plant, right where they work?

A. Oh, yes. They have a chute right close at hand where they shove all of the small fish down. Well, any fish that is broken, it goes right down with the small fish onto the carrier and goes back to the meal plant from the saltery.

Q. Is that the same way they dispose of cut or small fish, too?

A. They go down with the small fish, too.

Q. Where did you store the barrels involved in this 1358 half-barrel shipment after they were first packed?

A. Well, at the first packing we stored all of them inside the warehouse, which is quite large. The first repacking was stored inside of the building.

Q. Is that building heated?

A. No; I should say not. It is quite cool out there in the saltery because the floor is always wet, and rather chilly.

Q. Is that building located on shore on on a dock? [36]

A. On a piling on a dock.

Q. Where were they stored after they were repacked?

A. Until just prior to the time a boat comes they are all stored inside.

(Photograph marked Libelant's Exhibit 8 for identification.)

(Testimony of Lee H. Wakefield.)

Q. You have mentioned that some barrels were placed on the dock before the arrival of the Denali, I believe. Where were they placed on the dock?

A. They were placed just in front of the building. As shown in the picture there, the dock is rather small.

Q. I would like to have you identify that picture there when the Court is through looking at it. Handing you Libelant's Exhibit 8 for identification, will you tell us what that is?

A. That is a picture of the front of the plant at Port Wakefield.

Q. Is that an accurate representation of the plant?

A. Yes. That is a good front view, there.

Q. Do you know who took the picture?

A. I think my son took it,—Howard. He is quite a camera fiend and has hundreds of pictures.

Mr. Hamlin: I offer Libelant's Exhibit 8.

Mr. Wakefield: No objection.

The Court: Admitted. [37]

(Libelant's Exhibit 8 received in evidence.)

Q. (By Mr. Hamlin): Calling your attention to Libelant's Exhibit 8, would you be so kind as to mark on it with a pen the exact area where you piled barrels awaiting shipment?

A. That is the area just in front of the building there, between the big tank and that door leading into the warehouse.

Q. Have you marked it with any particular symbol?

(Testimony of Lee H. Wakefield.)

A. I have got red marks on it there showing the area that the barrels would be piled in.

Q. In what direction are you looking when you look at that picture, Libelant's Exhibit 8?

A. Looking at that, you are looking from the northeast against the plant there. That plant stands about northeast and southwest.

Q. The dock faces northeast, does it?

A. Yes.

Q. Approximately how many barrels are you able to pile on the face of the dock as you have indicated on Libelant's Exhibit 8?

A. Well, when we pile out as near the face as we can and leave room for slinging the barrels when the steamer [38] comes, we have had I think close to five hundred.

Q. Will it hold any more than that?

A. No; not and leave room to load.

Q. Do you remember how many were put on the dock before this particular shipment in suit herein was placed aboard the Denali?

A. No, I do not recall the exact number.

Q. About how long before the Denali came did you pile some on the dock?

A. I think about the last week of packing we put out,—starting filling up the dock, so it would be ready for the steamer.

Q. Did you take any precautions with those barrels which you placed on the dock to protect them from damage from the elements?

A. Yes. We always cover them either with a tarpaulin or salt sacks. Salt sacks really are even

(Testimony of Lee H. Wakefield.)

better than a tarpaulin, because they hold the dampness when we spray them down.

Q. How often do you spray them down?

A. Oh, several times a day if it is at all warm.

Q. Was that done with this particular shipment?

A. That would apply to all shipments where they are put on a dock.

Mr. Wakefield: I move to strike the answer [39] as not responsive.

The Court: Granted. It is stricken. The court will disregard it.

Mr. Hamlin: Mr. Reporter, would you read the question to the witness, please?

(Last question repeated by the reporter.)

A. Yes.

Q. (By Mr. Hamlin): Who has charge of the wetting down of the barrels which are placed on the dock?

A. My assistant and myself.

Q. Did you personally wet down this shipment?

A. Many times, yes.

Q. Is the nature of the dock and the location of this place where you piled this shipment such that it is ever in the shade during the day?

A. Most of it would be in the shade of the building.

Q. During what part of the day?

A. Well, in practically all of the day; well, the early morning sun might hit the top tiers but after the sun has swung around to the south, why, the building shaded the place where the herring was piled.

(Testimony of Lee H. Wakefield.)

Q. How were they piled on the dock? [40]

A. They were piled on their side, three tiers high.

The Court: Where were they so piled?

The Witness: On the face of the dock; that is, right up against the face of the building.

The Court: How many days did they remain in that position, if you know?

The Witness: Well, I don't think at any time they were on the dock more than five or six days prior to the time a steamer would come because we had plenty of space inside.

Q. (By Mr. Hamlin): Was this piling on the dock a customary practice with you?

A. Yes, it is.

Q. Why do you do it?

A. To facilitate loading when the steamer comes there.

Q. Did this cargo remain on the dock in that fashion any longer than was usual with you?

A. No, it did not.

Q. Were you present when the SS Denali arrived on August 23rd? A. Yes.

Q. What kind of a landing did she make?

A. She made a port landing.

Q. Is that the way she usually landed? [41]

A. No. Most always she made a starboard landing.

Q. What effect did that difference in landing make in so far as loading the cargo was concerned?

A. Well, when she made her ordinary landing

(Testimony of Lee H. Wakefield.)

of starboard, it brought Number 1 hold right up to the dock. But making a port landing it brought Number 3 hold up to the dock, to face the dock.

Q. Did you enter the hold of the vessel where this cargo was placed? A. No, I never did.

Q. Were you present during the loading of the cargo? A. Yes.

Q. After loading was completed, I take it you were then given what has been admitted in evidence as Libelant's Exhibit 6, a bill of lading?

A. Yes, we were.

Q. Who handled the sale of this shipment of 1358 barrels?

A. P. V. Bright & Company of Chicago.

Q. And who represented the Apex Fish Company in effecting a sale? A. P. V. Bright.

Q. No. I mean who from your organization?

A. Oh, in my organization?

Q. Yes.

A. Well, I handled it myself from the plant. [42]

Q. I notice the bill of lading runs to a consignee named as James Farrell & Company. Who are they?

A. They are the brokers that handle all of the oil and meal from the plant. We shipped the herring to them and they supervised the loading of the cars for P. V. Bright, a broker in Chicago.

The Court: At this point the proceedings are recessed until 2:00 o'clock this afternoon.

(At 11:55 a.m., Tuesday, July 15th, 1948, proceedings recessed until 2:00 p.m., in the United States Court House.) [43]

Seattle, Washington, July 13, 1948, 2:00 p.m.

The Court: You may resume the examination of this witness.

LEE H. WAKEFIELD

(Resumed)

Direct Examination (Continuing)

Q. (By Mr. Hamlin): Going back to the packing that you referred to, I will ask you if you made any personal inspection of the fish at the time of repacking? A. Yes, sir.

Q. What was the extent of your inspection?

A. When the barrels are opened at the time of repacking I always go along and feel of the fish to see just what the cure is.

Q. What can you observe by feeling the fish?

A. Well, you can tell the extent of the cure.

Q. How can you tell?

A. Well, by the feel,—by the firmness of the fish you [44] can tell very close to what the strength of the pickle is and what it is necessary to put back on it when it is repacked.

Q. Do you change the strength of your brine at the time of repacking?

A. Yes. I can tell very closely from long years of experience.

Q. I say do you mix that repacking brine especially for the repacking?

A. No. For the repacking we draw some of the brine off from the fish that have been—what we call the blood brine,—and then we add 100 per cent pickle to that to bring it up to whatever degree of

(Testimony of Lee H. Wakefield.)

strength we want to put back in the barrel.

Q. Were you familiar with the market prices for salt herring prevailing in 1946?

A. Yes, I certainly am.

Q. Did that market price fluctuate during 1946?

A. None whatever.

Q. What were the market prices for herring of the quality in suit herein in 1946?

Mr. Wakefield: I object to that as not being the best evidence; the witness has not been shown to be qualified. I submit that the best evidence would be actual sales, Your Honor. He is [45] in the business. He must have sold herring.

The Court: The objection is sustained with leave to counsel asking the question to further qualify the witness to make answer to such a question.

Mr. Hamlin: Very well.

Q. (By Mr. Hamlin): Did you make other sales of salt herring in 1946 aside from the one you have mentioned for this shipment? A. Yes.

Q. Did you make any before August of 1946?

A. Yes.

Q. Can you refer us to any specific sales before August, 1946?

The Court: The one thing that ought to be inquired of any witness is whether or not he is informed as to what the market was at such and such a time and, where the witness is a party, you don't have to inquire for anything other than his present state of information.

(Testimony of Lee H. Wakefield.)

Q. (By Mr. Hamlin): Following out the court's suggestion, do you know now what the price of salt herring of the quality in suit herein was in August, 1946? A. Yes, I do. [46]

Q. How do you know?

A. From sales we made.

Q. What was your personal participation in such sales?

A. Well, my broker would wire me from Chicago as to what he had the herring sold for; that was the established price.

Q. Did you keep in contact with your broker while you were at the plant at Port Wakefield?

A. Oh, yes.

Q. How often would you contact him?

A. Oh, possibly every week.

Q. I will ask you specifically if you can tell us of any transaction sale in July, 1946, or early in August before this present shipment?

A. Yes. We have established sales right here on the dock in Seattle.

Q. Do you have a particular sale in mind?

A. Yes, I have.

Q. What was the date of that sale?

A. It was a sale to A. Bundsen on August 9th.

Q. Of what year? A. Of 1946.

Q. What did you sell him?

A. It consisted of 180 half barrels medium at \$21 each, "X" dock Seattle. [47]

Q. Are there any other sales to which you can refer us prior to this shipment?

(Testimony of Lee H. Wakefield.)

A. I believe I have some more here. I believe that is the only record of sale that I have here prior to the time these fish came down.

Q. Were the fish involved in the Bundsen sale of the same type and quality as those involved in the shipment in question here? A. Yes.

Q. Have you any sales subsequent to the sale involved in this shipment in 1946?

A. Yes, I have.

Q. Will you refer us to any particular one?

A. I have one other sale here made to A. Bundsen in October,—October 29th, 1946, consisting of 211 half-barrels medium salt herring at \$21; 62 barrels large salt herring at \$23.

Q. Have you any other sales there subsequent to this shipment?

A. I have some sales here of damaged herring. I believe that is all that I have of record here.

Oh, I have one here, December 21st to Max Bortz of 6528 Orange Street, Los Angeles, California; 200 half-barrels medium at \$21.

The Court: \$21 per half barrel? [48]

The Witness: Per half barrel.

The Court: What would that be a barrel?

The Witness: Barrels at that time were \$40. Two half barrels usually brought a little more than one full barrel.

Q. (By Mr. Hamlin): Was that sold "X" dock or FOB car?

A. That was FOB car.

Q. Was that herring of the same quality and type as that involved in this action?

(Testimony of Lee H. Wakefield.)

A. Yes, it was.

Q. Did you have other sales in the fall of 1946 subsequent to the date of this shipment—I don't mean specific ones—but did you make other sales during that period?

A. Yes. We had other sales during the fall.

Q. Did you participate in them personally?

A. Those sales were made by my broker in Chicago, all of them, and handled by him.

Q. Who acted for Apex in dealing with the broker?

A. James Farrell & Company here acted as agents for P. V. Bright & Company of Chicago for the purpose of loading out the herring.

Q. Was there any change in prices at any time during [49] 1946? A. No, there was not.

Mr. Hamlin: I renew my question to the witness, asking him to state the fair market value of——

The Court: You might first, before you do that, ask him if he now knows what the fair cash market value of this product was at such and such a time and such and such a place.

Q. (By Mr. Hamlin): Mr. Wakefield, do you now know the fair cash market value of salt herring in half-barrels, medium and large, and in quarter barrels at Seattle, Washington "X" dock on September 4th, 1946; do you know what those fair market values were? A. Yes, I do.

Q. Will you state what they were for the three classifications of salt herring indicated?

(Testimony of Lee H. Wakefield.)

A. The quarter-barrels were \$13.00; the half-barrels medium \$21; and the half-barrels large, \$23.00.

The Court: That means half barrels containing large herring, is that what you mean?

The Witness: Yes, that is true; it is the size of the herring we are referring to when we say [50] medium or large. The size of the parcel is the same in all cases.

The Court: The one quarter barrel refers to what type of herring?

The Witness: Those were medium in the quarter barrels.

Q. (By Mr. Hamlin): Did you have sales pending for this entire shipment at the prices you have stated? A. Yes, sir; we did have.

Q. When did you return to Seattle in 1946 in the fall?

A. As I recall, it was the latter part of October.

Q. Was any of the shipment of 1358 barrels still in Seattle at that time? A. It was all here.

Q. Did you examine it? A. Yes, I did.

Q. Where did you examine it? A. Where?

Q. Yes, sir. A. On Bell Street Terminal.

Q. At any other place?

A. Some of it was in cold storage at Bell Street Terminal.

Q. Will you describe the condition of those portions or [51] all of the shipment which you examined? A. I didn't catch the question.

Q. Will you describe the condition of the shipment which you examined?

(Testimony of Lee H. Wakefield.)

Mr. Wakefield: I object to that, if the Court please, as being incompetent, irrelevant, and immaterial. He states that he examined it in October and it was discharged from the vessel in early September. I think without knowing all of the details as to where it was kept and under what conditions, between the time it left the ship and when he saw it a month or more later that it would be incompetent testimony to show the condition. I don't know what they did with it between the time it was taken out of the ship and when he saw it. Many things may have happened to it. I don't think it is proper.

The Court: Do you propose as a condition to your right to ask this question to connect up its condition when it started from the ship?

Mr. Hamlin: I do but I cannot do it by this witness. I must use people who saw it at the time it left the ship.

The Court: Upon the condition that the conditions at two different times are established to [52] be the same, the court will overrule this objection, subject to the condition that if he fails to supply that proof the court will upon motion strike it.

Mr. Hamlin: Will you read the question, Mr. Reporter?

(Last question repeated by the reporter as follows:

“Question: Will you describe the condition of the shipment which you examined?”)

A. Describe where or the condition of?

(Testimony of Lee H. Wakefield.)

(Last question repeated again by the reporter.)

A. The condition of the herring,—it was more than half of the herring still on the dock, in the open dock that had been culled and nothing but soup, you might say. It was disintegrated and absolutely spoiled. Then there was a portion that was in the cold storage which I examined and found in just fair condition. It was not prime. It showed the presence of more or less heat and the herring was quite soft.

Q. (By Mr. Hamlin): Was any of that shipment in good [53] condition?

A. No, not one barrel in first-class condition.

Q. Did you personally have anything to do with disposing of the shipment after your arrival in Seattle?

A. Yes; I had the entire sale or handling of the portions that were in question that might be usable.

Q. What was done with the herring?

A. Out of the lot that had been salvaged I succeeded in selling to the Independent Fish Company of Winnipeg, Canada, four hundred ninety-six half-barrels medium at 75 per cent of the then face value for good herring which was \$15.75 per half-barrel. Then there was some that was considered that they might possibly use, which they offered me \$8 a half-barrel for, which I accepted.

There are forty-eight half barrels medium of that at \$8.

(Testimony of Lee H. Wakefield.)

There was twenty-two quarter barrels out of that lot that they offered \$5 for, which I accepted.

The Court: What were the quarter-barrels left that you mentioned?

The Witness: The quarter barrels at \$5.00 each.

The Court: How many were there then?

The Witness: Twenty-two. [54]

A. (Continuing): That made a total to that one party of \$8,306.

The Court: That you realized from the sale of the——

The Witness: From the sale of the damaged stuff.

Q. (By Mr. Hamlin): You sold some more, too, didn't you?

A. Yes. There was a few left I sold to Max Bortz in Los Angeles.

Q. (By Mr. Hamlin): I think it is a matter agreed between counsel by exchanges of information that the total amount you realized was \$10,329, was it not?

A. Something like that I believe.

Mr. Hamlin: I then offer in evidence Libelant's request for admissions number 10 reading:

“That the balance of said shipment referred to in the amended libel herein at the time of its discharge from the Denali at Seattle, Washington, after deduction of the 632 barrels mentioned in request number nine, had no salvage [55] or other value whatsoever, save and except the following:

(Testimony of Lee H. Wakefield.)

596 half barrels medium at \$15.75 each,—\$9,387; 21 half barrels large at \$8.00 each,—\$168; 79 half barrels medium at \$8.00 each,—\$632; 22 quarter barrels medium at \$5.00 each, \$110; 8 quarter barrels medium at \$4.00 each,—\$32; total salvage, \$10,329."

The Answer of Respondent is as follows:

"Respondents are advised in the survey report of Alexander Gow, Inc., above referred to, that the sum of \$10,329 salvage was realized by the owner of the cargo in question by sale to the highest bidder."

Q. (By Mr. Hamlin): Mr. Wakefield, would this cargo of 1358 barrels of herring have normally incurred any cold storage or inspection expense if the buyers had accepted it and the sales had gone through?

A. No, it never would have been put in cold storage.

Q. Why?

A. Well, because the buyers were waiting here anxiously to have it loaded in cars and ship it.

Q. Do you know of your own knowledge whether or not there is a Weather Station at Kodiak?

A. There is one there I think; I am not positive about [56] that.

Q. How far is Kodiak from Port Wakefield?

A. I would say it is 28 to 30 miles on an air line. It is about thirty-five miles the way we go on a boat.

(Testimony of Lee H. Wakefield.)

Q. How often did you go to Kodiak during the summer of 1946? A. Usually once a week.

Q. How did the weather conditions compare between Port Wakefield and Kodiak in 1946?

A. Practically the same at all times.

Q. In thinking back over the period when this shipment was in your possession at Port Wakefield, Alaska, I ask you whether or not it was ever subjected to any extremes of temperature?

A. No, none whatever.

Q. Were the conditions of temperature to which it was subjected ever materially different from those to which your prior shipments in 1946 and prior years were subjected?

A. No, it was not materially different.

Mr. Hamlin: You may inquire. [57]

Cross-Examination

By Mr. Wakefield:

Q. Mr. Wakefield, with respect to the characteristics of the plant, the cannery, you don't have a separate warehouse, do you; it is part of the plant where you store the barrels of herring?

A. Yes, that is right.

Q. That is, it is right in with the rest of your operation?

A. Well, no. The herring department is out in the front end of the plant, where the other part is way in on shore.

Q. But you don't have a separate warehouse for storage purposes?

A. No. No, never have had.

(Testimony of Lee H. Wakefield.)

Q. And these barrels, after they are first packed, are stored where? A. In the warehouse.

Q. You have told in your testimony about opening them and re-brining and 20 per cent shrinkage and so forth. During the time from the time they are first packed until you reopen them, where do you keep them?

A. In the warehouse,—in the saltery part of the main [58] building.

Q. Then when you reopen them, you unpile them, do you? A. Yes.

They are taken down and stood on end and the end of the barrel taken out. And after we repack, of course, we lose 20 per cent; then we pile them back where we had them stowed before while they are curing.

Q. In what part of this herring plant are the barrels stored?

A. They are stored in the outside one hundred feet of the warehouse; well, it is about one hundred forty feet, to be exact.

Q. That is on the water side?

A. On the north part of the plant; the water side.

Q. In processing herring, is there a difference between mild cure and heavy cure?

A. Well, yes; sure, there is a difference.

Q. What kind of herring do you process?

A. We process what is called the Scotch cure.

Q. And that means a mild cure, doesn't it?

A. Well, just fairly mild,—not so very mild.

(Testimony of Lee H. Wakefield.)

What is called a hard cure, of course, is referred to as the Norwegian cure.

Q. What is the difference, if any, in your experience [59] between herring which is mild cured and that which is hard cured as to its keeping qualities?

A. Well, of course, herring that is hard cured will keep almost in any kind of climate, where mild-cured herring has to be kept fairly cool.

Q. Isn't it a fact, Mr. Wakefield, that the keeping qualities or the holding quality of salt herring has a direct relation to the amount of cure you give it?

A. The amount of salt you give it.

Q. Well, salt cure?

A. Yes, the salt in the cure, yes.

Q. In other words, the milder the cure, the more delicate and perishable the commodity, isn't that correct?

A. Yes, that is right.

Q. What is your principal market for mild cure salt herring?

A. The Jewish trade.

Q. From your experience, what type of herring do the Jewish trade demand or ask for?

A. Well, they ask for practically all the Scotch cure,—what we term the regular Scotch cure.

Q. Isn't it a fact, Mr. Wakefield, that one of your principal problems in the herring business is to get a herring as mild cured as possible for the Jewish [60] trade and which will also hold up,—get a balance between the cure and the demand of the market, isn't that your problem?

A. No, that is not.

(Testimony of Lee H. Wakefield.)

Q. You mean that these buyers that inspect the herring when it arrives here aren't interested in the amount of cure that it has?

A. Oh, they examine to see what the cure is. But they do not demand an extremely mild cure.

Q. What kind of cure was this herring that you put up in 1946?

A. It would be termed a firm Scotch cure.

Q. By Scotch cure you mean mild cure, don't you?

A. Yes, you might call it mild. It is a firm mild cure, if you want to put it that way.

Q. But it is a fact that the more salt you put in, the more lasting will be the keeping qualities of the product?

A. Not necessarily so. As long as it is thoroughly cured as a mild cure, it will keep indefinitely in mild temperatures.

Q. Well, I am not talking about mild temperatures. I am talking about the relation between the cure and a given temperature; let's say 70 degrees. Take two barrels of herring at 70 degrees, the mild-cured [61] herring will not stand up as long as the heavier cured, will it? A. No.

Q. How do you determine what degree of cure you are giving the herring when you pack it?

A. By testing the brine on the fish when we repack.

Q. How do you test the brine?

A. With a salometer.

Q. Does that show the percentage of salt?

(Testimony of Lee H. Wakefield.)

A. Yes, it does.

Q. What percentage did this herring in question in this case have?

A. When it was opened for repacking it ran about 85 per cent strength of brine.

Q. 85 per cent? A. Yes.

Q. What was it by the time it was shipped?

A. It ran between 85 per cent and 90 per cent when it was cured, ready for shipping.

Q. Isn't it a fact that the herring does not take any more cure after it is first brined,—when it is first salted I mean you get your maximum absorption, don't you, right there within the first thirty-six or forty-eight hours?

A. No, sir; that is not true. [62]

Q. Do you mean that it keeps on curing all the time?

A. It takes about ten days at least to be absolutely thoroughly cured. It runs from seven to twelve days, depending on the size of the fish and the fatness of the fish.

Q. Then after you have reached this condition of cure, as you call it, it doesn't take on any more cure after that, does it?

A. If you put in a stronger pickle it would pick up just a little bit of it.

Q. How much would it pick up?

A. Well, very slightly. If it is 85 per cent when we open it and we add 5 per cent more to that brine to refill, naturally, it would pick up maybe 1 per cent or 2 per cent by the time it got to the market.

(Testimony of Lee H. Wakefield.)

Q. Mr. Wakefield, isn't it a fact that 85 per cent is a very mild cured fish? A. No, it is not.

Q. How mild is it possible to have it, in your opinion?

A. You could have it down to 75.

Q. Did you ever pack any herring at 70 per cent?

A. 70? No, I don't think I have ever packed any at 70. I think I have packed some at 75 many years ago. [63]

Q. After the ten days of curing and you open the barrels and repack them, I understand that consists of two things; first, you put in more fish to take care of the shrinkage and, secondly, you put in additional brine, is that correct?

A. That is right.

First of all, we let off half the brine in the barrel so that the fish will settle down, and enable us to put in about 20 per cent additional fish. That fills the barrel up and then it is topped and re-brined with whatever brine it will take so that it is absolutely full when the bung is put in, ready for shipment.

Q. And that is what you mean by ready for shipment, after this has been done?

A. Repacking. They use the word repacking, but refilling is what it really is.

Q. And that is usually about ten days after it is originally packed? A. Yes.

The Court: Where do you get the herring for that refilling job?

(Testimony of Lee H. Wakefield.)

The Witness: We take from the same day's packing and dump part of those barrels. We dump one out of every five and use the fish out of those [64] barrels to fill up the others, from the same day's cure.

The Court: It results in a depletion of the over-all number of barrels that you started out with, is that right?

The Witness: Yes. You see, that accounts for the over-all quantity being about 20 per cent more than the repacked amount.

Q. (By Mr. Wakefield): After the repacking, where do you store your barrels of herring?

A. We store them,—we start in out in the outer end of the warehouse, fill that up. As we repack, we fill that up as we come back into the warehouse.

Q. How are they stored, on the ends or the bottoms or sides?

A. They are stored on their sides and tiered up three barrels high, lying on the bilge of the barrels, stowed on the bilge of the barrels.

Q. Can you tell us why you store them on their sides instead of the ends?

A. There is no particular reason why except that if you store them on the end it is a whole lot harder to stow. You don't get the same number in the same space. [65]

The Court: What about the ease with which you may thereafter examine the contents of the barrel?

The Witness: That is easy enough. We take

(Testimony of Lee H. Wakefield.)

them right down off of the pile and open them up and check them.

The Court: I mean the manner of stowage—whether it is laid up endwise or flatwise.

The Witness: That doesn't make a bit of difference.

The Court: You can get the bung out of the barrel just as well whether the barrels are on end or on their side?

The Witness: No. We have to up-end them if you want to check them after they are ready for shipment.

The Court: Proceed.

Q. (By Mr. Wakefield): When do you do this checking after they have been repacked and stowed in the warehouse; what do you recheck them for?

A. We never do that.

Q. Oh, you don't recheck them?

A. No, we don't recheck after that.

Q. I didn't think so. You said something this morning about inspecting the fish and you mentioned to see [66] if there was any feed in them.

Will you tell the Court what you mean by feed in the fish?

A. Yes. There are certain types of feed, what they call black feed, which is a kind of a little muscle shell or something of the kind. Whenever the herring have that we don't pack any of them because it has a tendency to burn the fish.

Q. It causes a fermentation, doesn't it?

A. Well, yes; you might say a fermentation.

(Testimony of Lee H. Wakefield.)

Q. That is one of your constant problems is to get herring or avoid herring that have feed in them?

A. No, that is not. It is very seldom that we get any that has the black feed. Any other kind of feed doesn't matter. It is only the black feed.

Q. Wasn't there a time, Mr. Wakefield, when the law permitted you to confine the herring days and convenient places so that they wouldn't feed and then they changed that so that you can't do that now and you have more feed than you used to have, isn't that a fact?

A. Oh, yes. In the early days when we were not using a meal plant we did have what we call "pounds." We would catch the fish and put them in a set pound; not so much about the feed as it was to hold a [67] quantity of fish while the run was on.

Q. In shipping herring, did you ship all of your herring in 1946 by Alaska Steamship Company boats?

A. No. I think we brought down part of it. In the last of the season we always bring some down with our fishing boats. They always want a couple of three hundred barrels for ballast, coming across the Gulf. So we always bring some down in the fishing boats at the end of the season.

Q. But your commercial boats were all with Alaska Steam?

A. They were all with Alaska Steamship Company.

Q. What is the practice you have followed at

(Testimony of Lee H. Wakefield.)

your plant with respect to how frequently you make shipments?

A. Well, we would make shipments as frequently as we could as long as we had a carload ready. We usually would always ship at least one carload at a time. Otherwise, if we didn't have a carload it would get down here and you wouldn't be able to ship it. You would have to stow it until you got sufficient to make a carload.

Q. Let's put it this way: During a normal season, how many commercial shipments will you make from your Port Wakefield plant? [68]

A. Oh, possibly six or eight shipments; five or six shipments. I wouldn't recall exactly the number we were making during the season.

Q. I was wondering whether you waited until you had any certain quantity before you shipped or how do you gauge it?

A. Well, we didn't, except as I explained. If we didn't have a carload we usually held until we got enough for a carload. Four hundred half-barrels is a carload.

Q. Four hundred half-barrels? A. Yes.

Q. On this particular summer, or in this particular season in 1946 when had you made a shipment from Port Wakefield prior to the one on the Denali which was involved in this suit?

A. We had some shipped prior to that, yes.

Q. I say when was that?

A. Either the last of July or about the first of August, somewhere along in there.

(Testimony of Lee H. Wakefield.)

Q. And this shipment on the Denali was made on August 23rd, is that right?

A. I think that is the date that they were loaded.

Q. Did you have any shipments prior to the one you say was the last of July or the first of August?

A. I think not. I don't recall now but I think not.

Q. What shipments did you have after the Denali on August 23rd?

A. Oh, we had several shipments after that.

Q. Up until how late?

A. About the 15th of October.

Q. Would the shipments all average around one thousand to fifteen hundred barrels each shipment?

A. No. Sometimes there would only be six or eight hundred,—five hundred or six hundred, depending on what was ready when the steamer came.

Q. Are you advised, Mr. Wakefield, in advance as to the date the vessel will arrive?

A. Yes, we are.

Q. How do you get that information?

A. Through the agent in Kodiak by wireless. We have a wireless station there and communicate with the agents in Kodiak. They inform us when to expect the steamer.

Q. I understand that in this instance of the shipment on the Denali, that some five or six days before the Denali arrived you put about four hundred barrels out on the dock?

A. Something like that, yes.

(Testimony of Lee H. Wakefield.)

Q. And you say that was to facilitate the loading of the [70] ship? A. That is right.

Q. How does that facilitate the loading?

A. When the ship lands, if we have got three hundred or four hundred barrels right next to the fling, when they start loading, why, we only have to have two men there to break down; whereas, if we have them piled 'way back in the warehouse, we have got to have three or four men to roll them out, to keep the fling going. So by having them out on the dock, some of them, why, it enables us to get them out that much quicker,—get the ship out that much quicker.

Q. But the nine hundred odd cases that you still had inside had to be brought out, did they not?

A. Yes. Well, some of those are just inside the door. The pile always starts right against the wall inside the door.

Q. Did I understand you to say that these barrels that were placed out on the dock five or six days before the vessel arrived were covered up with something?

A. They were covered with salt sacks and tarpaulins. We used salt sacks almost altogether because a salt sack is double and, of course, when it is wet it holds the coolness longer than a piece of canvas would. [71]

Q. How were they stowed out on the dock, on their sides or ends?

A. On their sides, yes,—on the dock.

(Testimony of Lee H. Wakefield.)

Q. Did you cover them yourselves?

A. I had the saltery crew cover them.

Q. Did you see it?

A. Yes, sir; I certainly did.

Q. Did I understand you to say also they were kept wet?

A. Yes, whenever there was any heat at all in the daytime we would go out and hose them over once in awhile. As a matter of fact, I used to do it very frequently myself.

Q. You used a hose?

A. Yes,—turned a hose on them. We had all kinds of water right there handy.

Q. Were they so covered as you described it when the ship arrived?

A. No. We always uncover them when we know the ship is coming in and get them ready to start loading.

Q. On this occasion, how long before the ship arrived were they uncovered?

A. They were uncovered that forenoon. I think the ship arrived about noon.

Q. Mr. Wakefield, from your long experience in Alaska, [72] those ships don't arrive on a definite hour or two hours or four hours, do they?

A. Well, yes; they arrive very close to the time that we have been notified from Kodiak.

Q. And you uncovered them how long before the ship got there?

A. During the forenoon of the day that the ship was to be in.

(Testimony of Lee H. Wakefield.)

Q. When did the ship get there?

A. I think it was around 11:00 o'clock.

Q. At night or in the morning?

A. No, at noon; near the noon hour.

Q. Is that your present recollection that the ship got there around 11:00 o'clock just before noon?

A. Yes; that is my recollection anyhow, that it was near lunch time when they got there.

Q. In your testimony this morning, in explaining Exhibit 7 I think it is which is a list of dates and barrels packed, you referred to the dates of August 18th, 19th, 20th, 21st, 22nd and 23rd, which showed only seven barrels packed on the 20th and none on the other dates.

Did I understand you to say that during those five or six days that you were engaged in repacking the fish all of that time? [73]

A. Part of that time was utilized in repacking prior to the time the steamer came.

Q. You have also testified that this repacking must take place around ten days after it is first put up because that is when you get your cure. How could you wait and repack this whole lot five days before the ship arrived when some of it was put up thirty days before?

A. It doesn't matter if it cures longer than ten days. I said it took ten days ordinarily for it to take the 20 per cent shrinkage.

Q. What is the fact, do you repack it at the

(Testimony of Lee H. Wakefield.)

end of ten or twenty days, or do you wait thirty days?

A. If we are busy gibbing or the crew is busy packing fish we hold it over longer than that until we have a slack day, and then we go ahead and repack.

Q. Do you know of your own knowledge, or have you records that would indicate when you repacked these barrels of herring that are shown on Exhibit 7 starting with the date of July 24th, 225 barrels; in other words, when was that 225 barrels that was packed on July 24th repacked?

A. I can't tell you now offhand.

Q. When was the 102 barrels packed on the 25th repacked?

A. That I couldn't tell you. [74]

Q. You don't know when any of it was repacked?

A. I know that it was packed during that time from the 24th to the 10th of August; the amount of fish that were packed during that time were repacked some time starting in about the 5th of August; somewhere along in there we would start repacking the fish that was gibbed the 24th, 25th, and 26th of July. That would be about our first repacking—about the 4th or 5th of August, those first ones that were gibbed.

Q. And then you would do it as you go along and as you have time for it?

A. Yes, that is right.

(Testimony of Lee H. Wakefield.)

Q. Does the same crew that gibs or packs the herring originally repack it? A. Yes.

Q. Does it take as long to repack a barrel as it did to pack it originally? A. No.

Q. Half as long?

A. About half as long, maybe a little more.

Q. And you say that you had a daily capacity of about 300 half-barrels?

A. Gibbing, yes.

Q. So that you could repack in a day more than three [75] hundred in a day, could you?

A. Yes, we could.

Q. How many would you say you could repack in a day?

A. Oh, I would say we could repack at least four fifty if we worked the same length of time,—the same number of hours.

Q. This Exhibit 8 which is a picture of the cannery as you will recall, you put two red marks on there. I don't recall now what you said that represented.

A. Between those two lines I marked a cross there with a red pencil is where the herring was stored on the dock,—between the door and that big brine tank that was out there.

Q. And the balance of it that was inside the plant was behind that partition, is that correct?

A. Yes, that is correct—behind the outside wall there.

Q. Why was it necessary, in your opinion, Mr.

(Testimony of Lee H. Wakefield.)

Wakefield, to cover the barrels that were out on the dock and keep them wet; why did you do that?

A. Well, in the event that the sun might come out and be sufficiently warm to affect the herring.

Q. The sun does affect herring, does it?

A. Well, if it is hot enough it might; it would draw the oil; it will draw the oil on them if it is very hot. [76]

The Court: When are you speaking of now,—with reference to what stage of packing or non-packing of the herring in the salted condition in the barrels are you now speaking?

With reference to the time they are first put in the barrels as salt herring, of what time are you now speaking in answer to this sun damage?

The Witness: What I thought he was asking was those that we put on the dock waiting for the steamer, why, we cover them.

The Court: That is, those that are already in the barrels?

The Witness: Oh, yes, already cured,—thoroughly cured and repacked.

The Court: Proceed.

Q. (By Mr. Wakefield): What is the purpose of keeping them wet?

A. It is to keep the top tier of the barrels from getting warm from the sun.

Q. In other words, that is all to keep them cool?

A. To keep them cooler, yes; we try to keep them as cool as possible.

(Testimony of Lee H. Wakefield.)

Q. As a matter of fact, isn't it your practice to put the barrels out on the dock because of the limited [77] space that you have in your plant for barrels?

A. Not until we are expecting a steamer. We have lots of space for storage of the barrels inside.

Q. Don't you customarily put them out on the dock, though, regardless of the arrival of the steamer, just because of the space that you need?

A. Not as a rule we don't put anything out on the dock until just a few days prior to when we expect a steamer.

Q. You have said that you put these four hundred barrels out there five or six days before the steamer arrived and that that was done to facilitate loading.

Why didn't you wait until the day before the steamer arrived?

A. Well, because when we were repacking during those days, why, in order to save handling them twice we rolled them right out and piled them on the dock to have them ready for the steamer.

Q. Then that was to save handling them twice for your own convenience, wasn't it?

A. That is right.

Q. Did I understand you to say that the Denali customarily made a port landing at your dock?

A. No. It customarily made a starboard landing.

(Testimony of Lee H. Wakefield.)

Q. A starboard landing. I think from my notes you said [78] port but maybe I am mistaken.

A. On this particular trip she made a port landing.

Q. When she makes a starboard landing, what did you say about the loading into the hatches?

A. When she makes a starboard landing, it brings the bow end of the boat right up to the dock and the stern end lays up against a big dolphin. That puts Number 1 hatch right in front of where we load. That is the customary way she landed at our place.

Q. When she makes a port landing, what happened?

A. Then the bow would be up by the dolphin and that would throw Number 3 hatch right up the face of the dock.

Q. Did you say that this was the first time she had made a port landing?

A. No. I didn't say that was the first time she ever made one.

Q. Well, is it a fact that if it is a port landing, the herring goes into Number 3 and 4 lower holds and if it is a starboard landing the herring goes in Number 1 hold? A. That is right.

Q. Do you recall the voyage of the Denali prior to the voyage in question at your plant on August 23rd when [79] she was there in July of 1946 on voyage 54? A. No, I don't recall.

Q. So that you wouldn't say whether or not your herring was loaded in Number 3 at that time?

(Testimony of Lee H. Wakefield.)

A. Well, I wouldn't say because this particular trip is the only one that I recall up to that time that they had ever loaded in Number 3 hatch. I supposed that the ship's crew knew enough about handling herring in 25 years to know how to stow it so I didn't pay any attention to it.

Q. You don't deny that the previous trip the shipment of herring from the plant was in Number 3 hold?

A. No, I don't admit that there was anything prior to that. I think that the prior shipment was in Number 1 hold.

The Court: What date was the prior shipment, if you recall, Mr. Wakefield?

The Witness: Well, it would be along in the last part of July.

The Court: Was that on a preceding voyage?

The Witness: Preceding voyage.

Q. (By Mr. Wakefield): Were you on the dock and talking with the ship's officers at the time your herring was loaded on August 23rd? [80]

A. Yes.

Q. You knew which hatch it was going into, did you?

A. Yes. I could see where they were putting it.

Q. Did you go down into the hold?

A. No, I never did.

Q. As a matter of fact, what hatches did they put it into? A. Number 3.

Q. Just in Number 3?

(Testimony of Lee H. Wakefield.)

A. I think every bit of it went in Number 3 hatch. I know that is where it was going when I went aboard the ship.

Q. I would like to ask you a little further about this feeling of the fish to test the cure. Do you tell by the firmness, is that what you mean?

A. That is right.

Q. You mean the harder the cure, the firmer the fish, is that right?

A. The harder the cure, the firmer the fish would be, that is right.

Q. And that is at the time it is repacked?

A. Yes, sir.

Q. Does that firmness change any after that time?

A. No. It would stay practically the same, depending on whether you would put a stronger pickle in it [81] after repacking.

Q. Let's suppose that it is 85 per cent and you repack it at 85 per cent, is there the same degree of firmness?

A. That remains the same.

Q. It remains the same. So that the fish actually, as far as its curing qualities are concerned, is set, so to speak, at the end of about 10 days?

A. That is right.

Q. What would be the purpose, then, Mr. Wakefield, of putting in a stronger brine when you repack it if the fish is set before that time?

A. If the fish,—if we opened a barrel and it ran only 80 per cent, we would put a little stronger

(Testimony of Lee H. Wakefield.)

brine which would bring it up to about 85 per cent after it was through curing. It will continue to cure a little after that if you have a stronger pickle on it.

Q. Then it isn't set when you repack it, is it?

A. To all intents and purposes it is.

Q. In testifying as to the price of the fish you used is the expression "X" dock.

What do you mean by "X" dock?

A. Well, some of the buyers,—especially Mr. A. Bunzen would buy herring right on the dock. Then [82] he would probably ship some of it and the rest of it he would put in cold storage to take care of future sales. In that event, he would pay us for the herring as it laid right on the dock. In the case of cars going to Chicago or New York or any of those places, we paid for loading the herring into the car.

Q. That plus cold storage and handling charges?

A. That is right.

Q. Isn't there some difference in the price, whether it is "X" dock or FOB cars?

A. No, it wasn't that year; whenever herring is scarce you get practically what you want for it. You don't have to make any differentiation as between loading it in the car or selling it on the dock.

Q. Well, the expenses that you incur are different, are they not, whether it is "X" dock or FOB cars?

A. Well, of course, we have to pay the dockage, you know,—the longshoring, when it is sold

(Testimony of Lee H. Wakefield.)

on "X" dock. We pay for all the unloading and the inspecting.

Q. You have testified to sales made on different dates. I note here one in December and one October 29th. Where is that herring kept from the time it is discharged from the ship until you sell it?

A. That herring was probably herring we brought down [83] with our own boats, the last of the pack which was packed in the last part of September and the early part of October?

Q. That wouldn't be true of herring that you packed on the 21st of December, would it?

A. No, I wouldn't say it arrived on the 21st of December.

Q. What I am asking is where you keep it from the time it gets here and you sell it?

A. At the Bell Street Dock.

Q. Is that true of all shipments?

A. If it is the first part of October or the latter part of November or the early part of November it isn't necessary to put it in cold storage. It will remain there only a short time.

Q. What do you mean by a short time?

A. If it is going to be shipped we leave it right on the dock in the open fish place we have right there.

Q. Are you referring to two or three days or four days, something like that?

A. Well, yes, or sometimes a week. It wouldn't hurt, depending on the weather. If it were warm weather we would put it right in cold storage.

(Testimony of Lee H. Wakefield.)

Q. Do you gamble on what the weather is going to be? How do you know whether it is going to be warm or [84] cold weather?

A. I have lived in Seattle a long time and I know a good deal about the weather. When it is cold, rainy weather it isn't necessary to store herring in cold storage.

Q. Suppose you have got a lot of herring on the Bell Street Dock without being in cold storage and it suddenly gets warm, what do you do?

A. Put it in cold storage.

Q. This herring that came down on the Denali on this voyage 55, a portion of it as I understand was in cold storage on the Bell Street Dock, was it?

A. What had been segregated and considered salable at some kind of a price had been put in cold storage and was in the cold storage when I came down. Pete Wahl, the inspector, segregated and took out all that he thought might be salable and put it in cold storage.

Q. Do you know how many barrels that was?

A. I think we had it here a while ago. It was something over 500, I believe.

Q. Counsel says 632. Does that coincide with your——

Mr. Hamlin: Excuse me. 632 were given to the reduction company.

The Witness: That was the amount, I think, [85] that went to the meal plant.

Q. (By Mr. Wakefield): 726. Will you tell us whether those 726 barrels were sold and taken out of

(Testimony of Lee H. Wakefield.)

the cold storage? You gave us the prices but didn't tell us where you sold them.

A. The carload to Winnipeg was on November 9th, consisting of 496 medium, 48 half barrels—that is at \$15.75; 48 at \$8.22,—quarters at \$5. Those were loaded out on November 9th.

Q. Were the rest of them sold after that time?

A. Yes. The rest of that damaged lot was sold I think very soon afterward,—just a few days, if I am not mistaken.

Q. What was the reason, Mr. Wakefield, for holding that herring from the first of September until November 9th, to sell it?

A. The reason was that the best offer they had been able to get for their herring prior to the time of my arrival here was 60 per cent of the real price for good herring.

I figured that I might be able on account of the scarcity of herring to recover a little more by personally handling the deal myself, which I was able to do. I got 65 per cent instead of [86] 60 per cent. The best offer that had been made up to the time I came down was the 60 per cent.

Mr. Wakefield: That is all.

Redirect Examination

By Mr. Hamlin:

Q. Mr. Wakefield, in your experience in shipping herring from Alaska, have you ever requested cool room storage or cold storage for your herring on the voyage down from Alaska?

A. No, I never have.

(Testimony of Lee H. Wakefield.)

Q. You always shipped in just the ordinary hold of the ship?

A. In the ordinary hold of the ship, yes.

Mr. Hamlin: That is all. I have no further questions.

The Court: Is there any further examination to be made by respondent?

Mr. Wakefield: I think not, Your Honor.

Mr. Hamlin: That is all.

(Witness excused.) [87]

The Court: You may call your next witness.

Mr. Hamlin: Mr. William T. Ferry.

WILLIAM T. FERRY,
called as a witness by and on behalf of Libelant
having been first duly sworn was examined and
testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your name, please?

A. William T. Ferry.

Q. Where do you live, Mr. Ferry?

A. Here in Seattle.

Q. What is your occupation?

A. Meteorological Aid.

Q. Employed by whom?

A. United States Weather Bureau.

Mr. Hamlin: Counsel, I have here an exhibit which is a positive photostat of an original. As I understand, you do not object to it on the ground that it is not the original but upon other grounds, is that right?

(Testimony of William T. Ferry.)

Mr. Wakefield: That is correct. [88]

Mr. Hamlin: May I have this marked as an exhibit?

(Climatological Data marked Libelant's Exhibit 9 for identification.)

Q. (By Mr. Hamlin): Mr. Ferry, showing you what has been marked Libelant's Exhibit 9 for identification, can you tell us what it is, please?

A. It is a photostatic copy of the Climatological Data compiled by the Alaska Section, Alaska.

Q. Alaska Section of what?

A. Alaska Section of the United States Weather Bureau.

Q. Do you know whether these sheets are prepared by employees of the United States Government or not?

A. The data on these sheets are compiled in Anchorage and printed in Portland, Oregon?

Q. Is the compiling of this data a part of the regular duties of the employees of the Weather Bureau? A. Yes.

Mr. Hamlin: I then offer Libelant's Exhibit 9 in evidence.

Mr. Wakefield: If the Court please, I have this objection to the exhibit. On the first page there appear to be certain comments and opinions with respect to whether it was the warmest or driest [89] July and so forth and so forth. I think that part of the exhibit is incompetent, irrelevant and immaterial. It is hearsay. There is no one here to cross-examine on these conclusions. I don't ob-

(Testimony of William T. Ferry.)

ject to the actual figures of temperatures but I do object to the first page with respect to the opinions and comments. That is pure hearsay.

The Court: That might depend on who made them and when and for what purpose.

If they were made for the purposes of this trial, then what you say might be well taken. If they were made by some official in the Weather Bureau at the time he was performing his ordinary duties and in connection with the performance by him of his ordinary duties; if he had a duty to make this comment in his official or governmental position, then what you say would seem to the court not to be tenable.

Mr. Wakefield: Except for the fact that we have no opportunity to explain or find out what this means. I don't know anything about it.

The Court: Your noted exception would not affect admissibility.

Mr. Wakefield: I am only objecting to the hearsay conclusions and statements on it. [90]

The Court: Your objection, however, requires the court to not admit the exhibit until some further proof is offered respecting the matter objected to.

Q. (By Mr. Hamlin): Mr. Ferry, calling your attention specifically to the matter appearing on the first page of the exhibit, and also on the,—well, the similar page for the month of August, 1946—I ask you if that written material there,

(Testimony of William T. Ferry.)

those statements, if you know by whom those are prepared?

A. I don't know who prepared those. I know in our office who generally prepares them, but I can't say that I definitely know who prepared it.

Q. I don't think it is necessary for you to state the name of the person, but what class of persons prepares it?

A. The general summary in our office is usually compiled by the Climatologist.

The Court: Why are they compiled by him?

The Witness: Well, it is his duty to write off summaries of the data for the State.

Q. (By Mr. Hamlin): Do you know upon what factual basis these summaries are prepared? [91]

A. Well, he has got his facts in front of him.

Q. What are those facts?

A. The figures of these different stations.

Q. Are records kept of temperatures for past years by the Weather Bureau in the Alaska Section?

A. I don't believe I understand that question.

Q. Does the Alaska Section of the Weather Bureau keep records for years past?

A. That is right,—of the Alaska Section?

Q. Yes? A. Yes.

Q. Are those available to the persons making up this report? A. Yes.

Q. Do you know whether or not they use those records in preparing these reports?

(Testimony of William T. Ferry.)

A. To find out their deviations from normal, they must. And to compile their normals they would have to use the records.

Q. Do these general summaries serve any purpose in the functioning and operation of the Weather Bureau; do you use that information for anything or is it just conversational?

A. It is taken from random through what occurred during the month and made a summary of. Does that answer [92] your question?

The Court: No. I believe counsel is trying to get to this point. Did the fellow who put that comment on that record do so as a part of his own entertainment or frolic of his own, or did he do it in pursuance of some official employment duty?

The Witness: He did it in the capacity of his job.

The Court: Is it required of him to make some comment like that?

The Witness: As far as I know, that is the standard operating procedure throughout the United States.

The Court: That the person who makes up that record has to put on that observation data?

The Witness: That general summary,—that writes the general summary.

Q. (By Mr. Hamlin): Is the same true of the remarks by observers, the temperature and the precipitation headings below that?

A. In our office we have a temperature summary and we have a precipitation summary, but as long

(Testimony of William T. Ferry.)

as I have ever worked there we have not had remarks by observers. [93]

Mr. Hamlin: I renew the offer at this time.

Mr. Wakefield: I make the same objection to the comments on the first page.

The Court: The objection is overruled for the reason that the court finds from this witness' testimony that that comment was placed on there in pursuance and performance by the person who put it on there of regular routine duty.

Mr. Hamlin: I wish to call the court's attention to a portion of this exhibit. It appears on the first page at the bottom of the right-hand column. There is no number on that first sheet but the succeeding pages are numbered commencing with "38" and running through to "42" and then there is no number, and then "44" picks up and goes on. But the thing I want to point out to the court is the small print at the bottom reading "The Southern Division consists of the southeastern,"——

The Court: Note 1, is it?

Mr. Hamlin: Yes, sir, Note 1.

The Court: You may proceed. I have that [94] identified.

Mr. Hamlin: "The Southern Division consists of the Southeastern, Pacific Coast, and Southwestern Islands Districts; the Northern Division consists of the remainder of the Territory."

Then under the General Summary, at the top left column,

"July, 1946, was a cool, rainy month in the Southern Division. It was the second consecutive

(Testimony of William T. Ferry.)

July that was cooler and wetter than usual in Southeastern Alaska.”

Then jumping over to the next similar page there is a similar comment about August, 1946, stating,

“August, 1946, was one of the coolest on record for Alaska.”

The Court: I don't see that.

Mr. Hamlin: That is following page 42, Your Honor. It is the next one with the heading on it “Climatological Data.” [95]

Mr. Wakefield: I didn't see that either, if the Court please, and in view of it appearing in here, I want to include that page in my objection also.

I don't know how to refer to it except that the following page is numbered 44 in the exhibit.

The Court: Is it something that has “number 8” as a part of the reference,—“Vol. XXXII”—Anchorage, Alaska, July, 1946, No. 8”?

Mr. Hamlin: Yes, sir.

The Court: Is that the page?

Mr. Hamlin: Yes, Your Honor.

The Court: Where is the word “August”—at the beginning of the General Summary?

Mr. Hamlin: Yes, sir.

The Court: Is that the paragraph or the first line of the paragraph you wish to call attention to?

Mr. Hamlin: Yes,—“August.”

The Court: The objection is overruled. The exhibit will be admitted for the purposes of this “No.

(Testimony of William T. Ferry.)

8" the same as "Number 7" the one that concerned the July summary.

Is there anything else now? [96]

Mr. Hamlin: Yes, Your Honor. I think this witness may be helpful in explaining some of the tables on the interior of this, if he may have the exhibit back.

Q. (By Mr. Hamlin): Mr. Ferry, calling your attention to the first page of Exhibit 9, the one that is headed "Vol. XXXII, Anchorage, Alaska, July, 1946, No. 7," I notice two tables in the right-hand column. What does that first table headed "Comparative Extremes for July, 1946," mean?

A. Just what it says,—Comparative Extremes. The highest and lowest,—the greatest amount of precipitation and the least amount of precipitation.

Q. Calling attention to the second item, "Pacific Coast," I notice in the first column the figure "84."

What does that mean?

A. That was the highest temperature recorded.

Q. And the next column has the figure "88."

What does that mean?

A. That means for previous years.

Q. 88 was the highest?

A. Yes; the highest recorded in previous years.

Q. And the same is true of the column headed "Lowest" [97] is it?

A. Yes; it is the lowest recorded this year and the lowest recorded in previous years.

(Testimony of William T. Ferry.)

Q. Is it true that the next table below is a comparison of data by years, commencing with 1907 and continuing through 1946 of mean temperatures, average precipitation and snowfall in the Southern Division and in the Northern Division?

A. By divisions, yes.

Q. Now, turn to page 38, please.

I see a large table there. If you can locate the weather station Kodiak, going across the columns, the first two columns, give the latitude and the longitude of the station, is that correct?

A. That is right.

Q. Then there is the elevation of the station. Is that the place where the actual temperature readings are taken at 21 feet elevation?

A. That is the approximate elevation of the Station.

Q. Under the column headed "Departure from the normal" I note the figures "minus 0.1." What does that mean?

A. In other words, the mean of 55.2 is a minus 0.1 below the normal; in other words, the normal for the month of July is 54.3. [98]

Q. Does that mean that this July, then, was colder or warmer than ordinary?

A. It was cooler than normal.

The Court: At this point those connected with this case are excused for at least ten minutes and may retire if they wish to do so.

(Recess.)

The Court: You may proceed.

(Testimony of William T. Ferry.)

(Monthly Meteorological Summary marked Libelant's Exhibit 10 for identification.)

Q. (By Mr. Hamlin): Referring to Libelant's Exhibit 10, will you tell us what that is, please?

A. It is a monthly meteorological report for the City of Seattle in conjunction with the Air Port.

Q. For what month?

A. September, 1946.

Q. By whom is this document prepared?

A. It is prepared by the City Office.

Mr. Wakefield: I have no objection to this, Your Honor.

Mr. Hamlin: I offer Exhibit 10. [99]

The Court: Admitted.

(Libelant's Exhibit 10 received in evidence.)

The Court: What year does this concern?

Mr. Hamlin: September, 1946, Your Honor.

Q. (By Mr. Hamlin): Mr. Ferry, I notice that on the table on the front of Exhibit 10, it has a heading "City Center."

Can you tell us where the readings for that City Center temperature are taken?

A. The thermometers are on the south wing of the Federal Office Building.

The Court: At what street in the city of Seattle?

The Witness: At First and Marion.

Mr. Hamlin: You may inquire.

(Testimony of William T. Ferry.)

Cross-Examination

By Mr. Wakefield:

Q. Referring to the last exhibit, Libelant's Exhibit, Libelant's Exhibit Number 10, I see a column under both "City Center," and "Airport" which says "Departure from Normal." Does that mean the degree [100] of heat above and below normal? Let's take the September one, City Center Departure from Normal, it says, "Plus one." What does that mean?

A. That is the deviation from normal; that plus 1 on the Airport is the deviation from normal.

The Court: In which direction does it deviate; is it more cold or hot?

The Witness: The month of September was one degree warmer than normal.

Mr. Wakefield: I have no further questions.

Mr. Hamlin: I have no further questions. May this witness be excused from further attendance?

The Court: Is there any objection?

Mr. Wakefield: No, Your Honor, no objection.

The Court: You may be permanently excused from attending this trial as a witness.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Hamlin: Call Mr. Floyd Ellis. [101]

FLOYD E. ELLIS,

called as a witness by and on behalf of the Libellant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your full name, please?

A. Floyd E. Ellis.

Q. Where do you live, Mr. Ellis?

A. In Seattle.

Q. What is your occupation?

A. I am a partner in the firm of James Farrell & Company.

Q. What is the business of James Farrell & Company?

A. It is primarily that of fish oil and fish meal brokerage and sales agent.

Q. Did you have any arrangement with the Apex Fish Company about the marketing of their salt herring in 1946?

A. We did, yes.

Q. Did you have any arrangements with them about the marketing of meal and oil produced by that plant?

A. We did.

Q. What was that arrangement? [102]

A. In the case of the meal and oil we act as their sales agent and sell it.

The Court: He asked you a specific question in reference to a specific time or season. What did you do on that occasion respecting that season?

Read the preceding question and the last question, Mr. Reporter.

(Testimony of Floyd E. Ellis.)

(Last preceding question and answer together with last question repeated by the reporter.)

A. We sold it.

The Court: Your answer might mean that you sometimes do or might sometimes in the future.

The Witness: We are their exclusive agent for selling fish oil and meal. We sold all of their fish and meal during the season 1946.

You asked about the herring, didn't you?

The Court: Counsel will ask any further extension of the witness' answer that is desired.

Q. (By Mr. Hamlin): Referring specifically to 1946, did you have any arrangement with them about the marketing of their salt herring and, if so, what was it?

A. We acted as their fiscal agents here to handle the [103] details of shipment.

Q. Was that arrangement oral or in writing?

A. Oral.

Q. It has been testified that the 1358 barrels of salt herring in suit herein were shipped to James Farrell & Company and the exhibit so states.

Will you state why that was shipped to your order?

A. That was shipped to our order so we could have control of the herring upon its arrival in Seattle, handle the shipping details and, if necessary, draw the drafts and make the arrangements in accordance with the instructions of the broker that sold it.

(Testimony of Floyd E. Ellis.)

Q. Did you have any interest in this shipment at all? A. None at all.

Q. When I say "you" I mean the firm of James Farrell & Company.

A. No; neither the firm nor myself.

Q. Did you receive any notice from Mr. Wakefield that this particular shipment had left Port Wakefield? A. Yes, we did.

Q. What did you do upon learning that it was on the way?

A. We immediately wired his broker, P. V. Bright & Company at Chicago advising them. [104]

(Day letter and Air Mail letter marked Libelant's Exhibit 11 for identification.)

Q. Showing you what has been marked Libelant's Exhibit Number 11, I ask you what it is, please?

A. This is a telegram sent by our office to P. V. Bright & Company, on August 26th.

Q. Is that the actual telegram or a copy thereof?

A. This is the actual telegram, sent over our teletype machine.

Q. From where did you get that document which has been marked Libelant's Exhibit 11?

A. Out of the office files of James Farrell & Company.

Q. Is that part of your own records?

A. That is part of my own records.

Mr. Hamlin: I offer Libelant's Exhibit 11 for identification in evidence.

Mr. Wakefield: It is objected to as irrelevant and incompetent. I looked at it, Your Honor. It

(Testimony of Floyd E. Ellis.)

just seems to be some correspondence about selling this shipment. They have already testified as to market value. I don't see any possible relevancy to this exhibit. It just clutters up the record.

Mr. Hamlin: If the Court please, this exhibit and the next one are offered for the sole [105] purpose of showing that the shipment was sold on approval of the buyers and was destined to move directly through Seattle without the necessity of incurring any storage charges here. It is the theory of the libelant that the storage charges and the inspection charges would not have been incurred had the shipment not been damaged in transit. That is why we would like to show that it was going to move right on through.

The Court: Have all of the objections been stated?

Mr. Wakefield: On the basis of counsel's explanation, it is further objected to as incompetent and irrelevant because of the fact that it is purely conjectural as to what would have occurred. This is seeking to prove by a letter that had the shipment arrived such and such might have been done.

It is hearsay, also, and objected to on that ground.

The Court: The objection is overruled. Libelant's Exhibit 11 is admitted.

Mr. Wakefield: The letter, Your Honor, is a letter from a person not here in court.

The Court: I have heard the testimony relating to it. The ruling will stand. [106]

(Testimony of Floyd E. Ellis.)

(Libelant's Exhibit 11 was received in evidence.)

The Court: Let Mr. Wakefield see the part that was thought to have been marked Exhibit 12.

Mr. Wakefield: That was the basis of my objection,—a letter from P. V. Bright & Company to James Farrell & Company, dated August 28th, 1946. It is purely hearsay, Your Honor.

The Court: Are you content to leave them attached together as Exhibit 11 instead of separating them?

Mr. Hamlin: Yes, that is perfectly all right.

The Court: Are you content to rest the admissibility on the same principle,—that is another thing.

Mr. Hamlin: Yes, sir. They constitute an offer and acceptance.

The Court: I understand the witness' statement that these are business records of his concern, James Farrell & Company, made in the course of business at the time that the transactions were occurring. Is that the effect,—do both sides understand that to be the effect of this witness' testimony concerning this exhibit?

Mr. Hamlin: I don't think he has said [107] so as to the letter.

The Court: Then before the court rules I would like further to know about that point.

Q. (By Mr. Hamlin): Mr. Ellis, I note that Exhibit Number 11 consists of a copy of a telegram and a letter. Will you tell us where the letter por-

(Testimony of Floyd E. Ellis.)

tion of that exhibit came from; from where did you produce it in court today?

A. That is out of the files of James Farrell & Company.

Q. Is that a part of your record of this transaction? A. It is.

The Court: When was that part of it acquired by your company,—the letter part of that exhibit?

The Witness: It came air mail, I would say, about August 30th—the way air mail travels. This was sent August 28th from Chicago.

Mr. Hamlin: That is all the identification I had in mind.

The Court: Does Mr. Wakefield wish to note any further objection or ask any questions of the witness?

Q. (By Mr. Wakefield): Mr. Ellis, I notice a lot of additions or changes [108] in ink on that letter. Who made those?

A. They were made by Mr. Starkel of P. V. Bright & Company.

Q. They were on there when you received it?

A. That is right; the ones in ink were. This note "Benjamin Franklin," made in pencil here, is just a pencil note made by my assistants telling where the man was stopping that was to inspect the herring. But the pen notes were in the letter at the time it was received.

Q. Do I understand that this letter constitutes a firm contract to buy this entire shipment; is that the purpose of it?

(Testimony of Floyd E. Ellis.)

A. The purpose of the letter is to give us instructions as to whom to deliver the herring to upon arrival in Seattle; also giving us the price at which the herring has been sold so we will know how to bill it or to make collection here before we permit the merchandise to leave our hands.

Q. That pertains to the whole shipment of 1358 barrels? A. That is correct, yes.

The Court: Is there any objection to that pencilled notation on there, referred to by the witness a moment ago?

Mr. Wakefield: No. No, I don't object to [109] that.

The Court: The ruling as to all parts of this exhibit including this letter as well as the telegram previously testified to by this witness is now admitted and will remain in evidence, the objections thereto being overruled.

(Libelant's Exhibit 11 received in evidence.)

Q. (By Mr. Hamlin): Did you employ anyone to inspect this shipment of 1315 barrels of salt herring upon its arrival in Seattle?

A. We did.

Q. Who did you employ? A. Pete Wahl.

Q. Is Mr. Wahl now living?

A. He is not.

Q. Do you know when he died?

A. In an accident on the railroad in December, 1946.

Q. What did you ask Mr. Wahl to do for you about this shipment?

(Testimony of Floyd E. Ellis.)

A. We simply asked him to inspect the herring upon its arrival and report its condition.

Q. What was Mr. Wahl's business?

A. Well, his business was that of inspecting and handling various types of fish, especially salt fish of different [110] kinds.

Q. Had you ever employed him before for this kind of thing?

A. We did it quite regularly.

Q. Do you know whether he inspected this shipment on September 4th? A. He did.

Q. Did you request a report from him regarding this shipment? A. I did.

Q. Under your arrangement with him, were you to pay him for this report and inspection?

A. Yes.

Q. Did he give you a report?

A. Yes, he did.

Mr. Hamlin: May we have this marked for identification, please?

(Letter from Wahl Brothers (report) marked Libelant's Exhibit 12 for identification.)

Q. (By Mr. Hamlin): Showing you what has been marked Libelant's Exhibit 12 for identification, can you tell me, Mr. Ellis, what that document is?

A. That is the report on the condition of the herring that arrived on the SS Denali, Voyage Number 55 [111] from the Apex Fish Company.

Q. By whom was that made?

A. By Peter A. Wahl of Wahl Brothers.

(Testimony of Floyd E. Ellis.)

Q. Is this the report to which you have just made reference in your prior testimony?

A. It is.

Q. Do you know who prepared this report?

A. Peter Wahl.

Q. Are you able to identify the signature at the foot of it? A. I am.

Q. Is that Mr. Wahl's signature?

A. It is the same signature, it appears to me, that he has been using for years.

The Court: That seems to the court to be an argument, your last statement. Can you answer the question?

A. (Continuing): Yes, it is his signature.

Mr. Hamlin: I offer Exhibit 12 in evidence.

Mr. Wakefield: If the Court please, I would appreciate Your Honor's looking at the exhibit if you have not already seen it.

The Court: I wish to see it further.

Mr. Wakefield: I object to it. Mr. Wahl is now deceased and this purports to be a report wherein [112] among other things, he expresses an opinion, Your Honor, as to the character of the fish and what may have caused the condition that he found.

The man is not here in court for cross-examination and I think it is incompetent, irrelevant and immaterial. It is hearsay and prejudicial to the respondent to admit in evidence the opinion of a material fact stated by a witness now deceased where we have no opportunity to cross-examine

(Testimony of Floyd E. Ellis.)

to find out the basis for the opinion he expresses, his qualifications to express one, what he did to determine the opinion that he does express and all of those things. It is highly improper as to that portion of it.

If the Court would feel so inclined, I think that we would have no objection to the report or the exhibit except the first sentence in paragraph 2 and the last paragraph. The rest of the exhibit I would not object to, but I strenuously object to the first sentence of paragraph 2 and all of the last paragraph as being purely hearsay and prejudicial without any opportunity of the respondent to cross-examine this witness to find out about it.

The Court: May I ask Counsel if he would have the same objection if this had been made by [113] a marine cargo surveyor or a so-called marine surveyor who was requested by one of the parties to inspect the condition about certain cargo and made a certificate and report upon his inspection as to condition of cargo; would Counsel feel that such a certificate is inadmissible and that the reason therefore is the same as those mentioned here by counsel concerning this communication?

Mr. Wakefield: Yes, as to expressions of opinion, Your Honor. As to facts, no. If he had stated that the fish was examined and its condition was so and so, and then went on and told the facts.

The Court: Have you any authority to support your objection which you wish the court to have the benefit of?

(Testimony of Floyd E. Ellis.)

Mr. Wakefield: No. I think it is almost elementary that the expression of opinion on a material fact by a deceased witness who cannot be cross-examined is inadmissible.

The Court: If that person is somebody who is a doctor or a lawyer or a minister of the gospel, or a chemist or specialist of some sort or other who is in the business of making certificates of condition reflecting his professional [114] opinion, does Counsel feel that his statement applies to such a certificate?

Mr. Wakefield: Yes, absolutely.

The Court: I am frank to say that I need the benefit of your authorities upon this question.

Mr. Wakefield: Your Honor, I haven't got any authority. I would certainly be glad to bring some but——

The Court: I am not aware at this moment of a limitation upon admissibility of a marine surveyor's certificate that it contains no opinion of the expert surveyor concerning condition. In view of the proof which has been made by this witness as to who this person was and what his business was, and what the purpose of obtaining this report was from this particular person, I am inclined to think that it stands in the category that is analogous to that of a marine surveyor's investigation and report concerning condition of cargo.

Mr. Wakefield: I was not aware that a marine surveyor's report would be admissible. I have never heard of it, Your Honor, unless the man is here in

(Testimony of Floyd E. Ellis.)

person to testify. I have a right to find out the basis upon which he expresses [115] his opinion. How does he know that it was heat? I want to know why.

The Court: It may be that if the surveyor was living he would have to come here and testify. That is possible. But now he is dead and cannot testify. Should the party for whom the inspection was made lose the benefit of this information now that the inspector is dead?

Mr. Wakefield: They have other experts. Captain Perry is here in the court room.

The Court: They do not have this one.

Mr. Wakefield: Regardless of that fact, Your Honor, I am very sure that an opinion on a material fact is not admissible——

The Court: Suppose this inspector, Mr. Wahl, was an employee of a concern whose business it was to make inspections of this sort and make reports on such inspections, and in the course of that employee's duty he made an inspection and made a report to his principal thereon and the principal kept that report in its permanent records; and suppose today somebody connected with that principal's business was asked to testify concerning it, could not the records so accumulated be admitted in evidence? [116]

A. Not on matters of opinion.

The Court: Does Counsel offering the exhibit have any authorities to submit in support of Counsel's offer?

(Testimony of Floyd E. Ellis.)

Mr. Hamlin: I have authorities, Your Honor, on the admissibility of the document as a memorandum made by an agent of a person party to the instant litigation provided such a general employee has since deceased.

(Argument by respective counsel.)

The Court: The Court is of the opinion that this is a part of the records of the addressee of this letter acquired in the ordinary course of its business and that the witness has sufficiently identified this as a part of such records and that it is admissible under the terms and provisions of the statute contained in twenty-eight—28 USC Section 695.

Let that exhibit be now admitted.

(Libelant's Exhibit 12 received in evidence.)

Mr. Hamlin: I now offer in evidence Libelant's Interrogatory Number 16: [117]

“Please state whether any of the barrels of salt herring mentioned in the Amended Libel discharged from the Denali prior to such strike and stoppage of work were in a damaged condition, and if so, how many?

“Answer: Some barrels discharged before the strike from Number 3 lower hold were alleged to be damaged, but respondent does not know how many. Mr. Johanson, who superintended the discharge of said cargo, states that after about 100 barrels had been discharged on September 4th, 1946, ‘I was informed by the dock that contents of the barrels were spoiled.’ ”

(Testimony of Floyd E. Ellis.)

The offer is made of the Interrogatory and of the Answer.

Q. (By Mr. Hamlin): Mr. Ellis, did you notify anybody on behalf of the carrier of the fact of this damage to the cargo?

A. I notified Mr. MacClellan the morning of the 5th of the damage to the cargo.

Q. Who is Mr. MacClellan?

A. The Claim Agent of the Alaska Steamship Company. [118]

Q. Did you make any arrangement with him for a joint survey? A. I did.

Q. Was that confirmed by any written communication from him?

A. Yes. There is a letter that I handed you there that gives that arrangement.

(Letter from Alaska Steamship Company, marked Libellant's Exhibit 13 for identification.)

Q. (By Mr. Hamlin): Handing you Libellant's Exhibit 13 for identification, can you tell us what it is, please?

A. This is a letter from Mr. MacClellan, the Freight Claim Agent, Alaska Steamship Company, sent to our firm to my attention regarding the spoilage of salt herring on the SS Denali, Voyage WSA 55, stating that—

The Court: What does it state?

The Witness: It states the Marine Surveyor—

The Court: You can't state the contents of the letter. The letter is not in evidence yet. That

(Testimony of Floyd E. Ellis.)

can be done only after it is received in evidence.

Q. (By Mr. Hamlin): From where did you produce that record? A. From my files.

Q. Is that part of your files?

A. It is.

Q. Can you identify the signature appended to it?

Mr. Wakefield: If the Court please, I have no objection to the letter as a letter from Mr. MacClellan but it is not material. Mr. MacClellan is here and Captain Perry is here. It talks about them. Let's get them on the stand. There is no materiality to the letter. It doesn't pertain to any issue in this case.

Mr. Hamlin: I think it does, if the Court please.

The Court: The Court doesn't wish the witness to state the contents of the documents until it is in evidence.

Mr. Hamlin: I am sorry that that happened, Your Honor. The letter is to be offered to show that there was a joint survey.

The Court: The Court will await further proof of the authenticity necessary to be established in connection with this matter.

Mr. Wakefield: Just to clear up Counsel's [120] point. The respondent makes no point or issue in this case about lack of notice. We will admit notice if that is what he is driving at.

The Court: Have you any objection to the admissibility of this exhibit?

Mr. Wakefield: Yes,—as to its not being relevant.

(Testimony of Floyd E. Ellis.)

The Court: Proceed to something else, then.

Mr. Hamlin: So long as that issue is admitted, I have no reason for offering the document, although it has been marked now.

The Court: Do you wish to withdraw it?

Mr. Hamlin: I think that would be advisable.

The Court: It is now withdrawn and it will be returned to Counsel who produced it.

(Libelant's Exhibit 13 withdrawn.)

(Wahl Brothers Invoices marked Libelant's Exhibit Number 14 for identification.)

Mr. Hamlin: Counsel has just agreed that the next four exhibits may be all put together, and that they may be offered and admitted as evidence that we have paid these items of expense. He is not admitting that they are authorized by his client. They are merely being offered to show that we paid [121] them.

The Court: These exhibits of which you speak should first have identifying marks.

(Group of bills marked Libelant's Exhibit 15 for identification.)

Mr. Hamlin: I then offer Libelant's Exhibit 15 for identification.

The Court: Is there any objection?

Mr. Wakefield: If the Court please, the exhibit consists of a number of bills marked "paid."

The Court: "Port of Seattle" seems to be the top of the billing. All of the bills seem to be on the letterheads or billing heads of the Port of Seattle with the exception of Laucks Laboratories

(Testimony of Floyd E. Ellis.)

invoice number 96267 and number 96557, and L. C. Perry, Marine Surveyor, Invoice Number 159.

Mr. Wakefield: I have no objection to the exhibits being offered as proof of the fact that those bills were paid. I do not admit that they all have to do with this case.

The Court: Have you any objection to their offer in evidence?

Libelant's Exhibit 15, do you have any objection to the offer of it in evidence at this time?

Mr. Wakefield: Not, as I have stated, that [122] they have paid the bills and that those are the bills that were paid. I don't admit that it is evidence of the fact that they were bills incurred as the responsibility of the libelant or in connection with this shipment of herring.

The Court: Well, that hasn't been proved yet, has it?

Mr. Hamlin: No, Your Honor.

The Court: Then that is a very material part of it. The objection is sustained subject to further proof. Proceed.

Q. (By Mr. Hamlin): Handing you exhibits which have been marked Libelant's Exhibit 14 and 15, Mr. Ellis, I will ask you first what is Exhibit 14 for identification?

A. A bill for inspection in culling herring from Wahl Brothers.

Q. What is the connection of that exhibit to the shipment of 1358 barrels of herring in suit herein?

(Testimony of Floyd E. Ellis.)

A. This is the inspection of 971 of those half barrels discharged on September 4th and 5th.

Q. There is another one there that covers an inspection when? [123]

A. Another one that covers an inspection on September 9th.

Q. Are you familiar with the usual charge for that kind of work? A. Yes.

Q. Do the amounts appearing on Exhibit 14 for identification conform to what is reasonable for what was done? A. Yes.

Mr. Hamlin: I offer Libelant's Exhibit 14.

Mr. Wakefield: May I ask the witness a question?

The Court: You may do so if it concerns admissibility.

Q. (By Mr. Wakefield): Mr. Ellis, didn't you testify a moment ago that this herring was sold subject to inspection?

A. Yes, that is correct.

Q. And Mr. Wahl would have inspected it anyway, wouldn't he?

A. He would have made the first inspection.

Q. How much did he charge for inspecting this lot of herring? A. \$67.97.

Q. Is that the only bill? [124]

A. There is another bill that isn't in connection with the first inspection.

Q. What is the next bill?

A. The next bill is for inspection and culling. That was to segregate the various degrees of dam-

(Testimony of Floyd E. Ellis.)

aged herring after it was determined that the herring was damaged.

Q. How much was that?

A. That amounts to \$99.00.

Q. What is the third bill?

A. This is later inspection and culling of herring on the last part that was delivered.

Mr. Wakefield: If the Court please, I have no objection to the first and second bills. The third one is objected to as not being shown to be connected with this case. It is an ordinary inspection that would have been made whether the fish was damaged or undamaged.

Q. (By Mr. Hamlin): Is that true, Mr. Ellis, that that first inspection would have been made whether the fish was damaged or not?

A. Yes, I believe it is.

Mr. Hamlin: I am very sorry that got in there, then. I ask permission to remove it. [125]

The Court: Exhibit 14 will be returned to Counsel and the parts that it is desired be deleted may be removed from the exhibit.

(Libelant's Exhibit 14 handed to Counsel and a part thereof removed from the exhibit.)

Mr. Hamlin: We have now extracted the objectionable portion of the exhibit and I renew the offer in evidence of Libelant's Exhibit 14 for identification.

The Court: Libelant's Exhibit 14 is now admitted.

(Testimony of Floyd E. Ellis.)

(Libelant's Exhibit 14 received in evidence.)

The Court: What objection is there to Libelant's Exhibit 15? Do you wish to offer any more proof as to Exhibit 15?

Mr. Hamlin: Yes, I think I had better, Your Honor.

Q. (By Mr. Hamlin): Do you now have Exhibit 15 before you? A. Yes.

Q. Will you tell us what that exhibit consists of? [126]

A. These are wharfage and handling charges in connection with the discharge and moving of the herring into storage.

Q. You are now referring to invoices from the Port of Seattle, are you?

A. These are Port of Seattle invoices, yes.

Q. Are there any storage charges there?

A. Yes; there are storage charges.

Q. Are there any charges in those invoices which would not have been incurred by this shipment in the ordinary course of moving to the Port of Seattle if the buyers had accepted the goods?

A. Let me look through the exhibit.

Q. I mean which would have been incurred by the shipments.

A. Would you repeat that again, please?

Q. Yes, I think I had better.

Are there any charges appearing in the invoices in Exhibit 15 which would have been incurred by the shipment anyway in its normal passage through

(Testimony of Floyd E. Ellis.)

the Port, if the buyers had accepted the shipment?

The Court: Irrespective of damage would these charges have been incurred anyway in normal shipment; I believe is what was understood to be the question.

A. The wharfage item would be incurred in any case,—wharfage over the dock. [127]

Q. (By Mr. Hamlin): You have a notation on that top invoice, do you not, down in the lower left-hand corner, indicating how much is to be included in your claim?

A. That is right. There is a notation here of the normal charge for wharfage and the normal charge for handling which has been deducted from the claim.

Q. And it is that amount which is included in the libel herein, is that right?

A. That is correct.

Q. Except for that item, I take it there is nothing in there that the shipment would have incurred in its normal passage through the Port, is that right? A. That is correct.

Q. Then what is the next bundle of invoices there?

The Court: You are leaving the Court without any way of determining how much of the bill is a proper charge and how much is not. I have no way of knowing from what has been said.

Mr. Hamlin: I am sorry.

(Testimony of Floyd E. Ellis.)

Q. (By Mr. Hamlin): Let's go back to page 1 of the exhibit, please, Mr. Ellis. A. Yes.

Q. What is the total amount of the bill on that first [128] page?

A. \$256.12 is the total amount of the bill.

Q. How much of that would have been incurred by the cargo anyway in passing through the Port?

A. \$102.53 would have been incurred anyway.

Q. What is the proper amount to be included in the claim? A. \$153.59.

The Court: Was there some cents to the \$102?

The Witness: Yes. \$102.53, Your Honor.

The Court: That leaves \$153.59, is that correct?

The Witness: That is right.

The Court: You may proceed now.

Q. (By Mr. Hamlin): Now, the next invoices in Exhibit 15 are what?

A. The next one is for \$258.72.

Q. Well, that is a Port of Seattle bill, is it not?

A. That is a Port of Seattle bill.

Q. Well—— A. You don't want that?

Q. I don't think so.

A. The next bill is Laucks Laboratories, \$10.

Q. Is that a reasonable charge for the service they rendered? [129] A. That is right.

Mr. Wakefield: What about the Port of Seattle bills; are they withdrawn?

Mr. Hamlin: No. They contain a complete explanation on the face.

Q. (By Mr. Hamlin): Were the Port of Seattle bills and the Laucks Laboratory bills incurred in connection with this loss?

(Testimony of Floyd E. Ellis.)

A. They were, with the one exception that I mentioned on that first bill.

Q. Yes. And the next invoices are what in Exhibit 15? A. Laucks Laboratories.

Q. You testified about those? A. Yes.

Q. Are there two of them?

A. Yes, sir; there are two from Laucks Laboratories, one on September 5th, and one,—the second part of the shipment on September 30th; each for \$10.

Q. What do they cover?

A. They cover their inspection of the condition of the herring on the two times it was taken off the boat; that is, the first part of the shipment and the second part of the shipment. [130]

Q. The next one is L. C. Perry?

A. The next one is L. C. Perry.

Q. What services does that cover?

A. That covers his services as a Marine Surveyor, inspecting the condition of the herring and the stowage and so forth.

Q. What is the amount of that bill?

A. \$450.

Q. In your opinion, is that a reasonable amount?

A. I would consider it so for the work done.

Mr. Hamlin: I offer Libelant's Exhibit 15 in evidence.

The Court: Is any part of the exhibit 15 other than the \$102.53 an amount which would have been incurred anyway even if this cargo hadn't been damaged?

(Testimony of Floyd E. Ellis.)

The Witness: If the cargo hadn't been damaged, no, there would have been none other incurred.

Mr. Wakefield: If the Court please, I would like to point out, just so Your Honor can note it at this time, that we do not admit that those bills would not have been incurred anyway and I will have evidence later on in my case to prove that a portion of these bills would have been incurred regardless [131] of the damage. I make that note.

Secondly, I want to object to the exhibit, the item paid to L. C. Perry, not on the ground that it wasn't paid, but that legally it is not proper charge against the respondent.

They had Mr. Wahl survey and inspect this fish and Exhibit 14 is his bill. The rule is that they can't have more than one surveyor and charge it against the respondent.

The Court: Doesn't that go to the merit rather than to the weight?

Mr. Wakefield: I think it goes to the merits, yes.

The Court: Rather than admissibility.

Mr. Wakefield: I was making that observation as part of——

The Court: The objections noted are overruled with the exception of wharfage and handling in the amount of \$102.53. As to that, the objection is sustained.

In all other respects this Libelant's Exhibit 15 is now admitted, the objections thereto being overruled.

(Testimony of Floyd E. Ellis.)

(Libelant's Exhibit 15 received in evidence.) [132]

The Court: It is unfortunate that you have mixed up with these exhibits these inadmissible items and that the inadmissible items cannot be segregated and be physically deleted at this time.

Is the wharfage and handling part of this bill segregable from the other items? If so, I request that Counsel segregate it and physically detach it from the exhibit.

Mr. Hamlin: I am sorry. It did not seem it could be done that way. The best we have been able to devise is a little computation in the lower left-hand corner of the exhibit.

The Court: The Court has already made the computation. The total amount of the exhibit is reduced to the extent of \$102.53.

Mr. Hamlin: Yes, Your Honor.

Q. (By Mr. Hamlin): Had you made any arrangements for forwarding this shipment from the ship, if it was approved by the buyers?

A. Yes, we had.

Q. What arrangements had you made?

A. We had made arrangements with the railroads to order in cars upon inspection and approval of the fish.

Mr. Hamlin: You may inquire. [133]

Cross-Examination

By Mr. Wakefield:

Q. Mr. Ellis, if this shipment had not been damaged, will you tell us just what would have

(Testimony of Floyd E. Ellis.)

happened; it would have been taken out of the hold of the ship and placed on the dock. Then what would have happened from then on?

A. It so happened that two of the buyers of this material were in Seattle awaiting the shipment so that they could make inspection. They were down there the morning that the material was discharged and saw the material. Had they accepted, it would immediately have been loaded into cars that we had ordered from the railroad company to take the herring. There was a case there I think of one or two small lots to a Seattle buyer which would have been taken delivery of right on the dot as was customary with him.

Q. Mr. Wahl customarily opened and inspected all of these barrels upon arrival, did he not, in Seattle for you? A. He generally did.

Q. And that would have been done first?

A. Let me say this: He did at the time they were coming [134] off the boat.

Q. Do I understand you to say that had this fish been in sound and acceptable condition you would have had no charges nor wharfage, cold storage, dockage and handling inspection?

A. No. I have said that the wharfage should be deducted here, yes.

Q. Well, the others?

A. There would have no storage charge.

Q. Where would the herring have been kept until it was loaded on the railroad cars?

A. The cars were there ready to be loaded upon inspection and acceptance by the buyers.

(Testimony of Floyd E. Ellis.)

Q. Where,—on the dock? A. Yes.

Q. You mean that you had ordered the cars there in anticipation of this shipment?

A. We always arranged a,—the railroad have a special department for handling salt herring. We arranged with the railroads to have cars available upon our call to tell them that the herring was there and has been accepted and ready for movement.

Q. And those are refrigerator cars are they?

A. I think so.

Q. You mean it is shipped under refrigeration from here [135] to New York?

A. I think that is the practice. The manager of our Shipping Department handles the actual details on that and I would have to refer to him on that but I think that is the practice.

Q. Well, this matter of inspection by Mr. Wahl, was that a standard practice that you followed on each shipment as it was discharged to have it inspected?

A. We generally followed that procedure where the shipment was going to get out of our control, where it was going to be shipped out of the Territory. Where the herring was delivered right here on the dock to a person like, say, Mr. Bunzen and he accepted the quality of the herring, there was no necessity of having an individual inspector,—I mean a separate inspection. We did it for the protection of the Apex Fish Company where it was going out of the territory.

(Testimony of Floyd E. Ellis.)

We did it where it was going out of the Territory and there was no buyer here to inspect it for himself. Where there was a buyer here to inspect it for himself, that was unnecessary because he either accepted it or rejected it right there.

Q. The buyer can't inspect it himself. Somebody has to [136] open the barrels and re Cooper them.

A. Pete Wahl was right there for that purpose, to open it and let them examine it and they accepted it or rejected it right there themselves.

Mr. Wakefield: That is all.

Mr. Hamlin: No further questions.

The Court: Step down.

(Witness excused.)

The Court: We will take the recess at this time until tomorrow.

Court will now be adjourned until tomorrow morning at 10:00 o'clock.

(At 5:00 p.m., Tuesday, July 13, 1948, court recessed until 10:00 a.m., July 14, 1948, in the United States Court House.) [137]

Seattle, Washington

July 14, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: In the case on trial the court made certain statements regarding the admission in evidence of Libellant's Exhibit 12. The Court said, among other things, "The Court is of the opinion that this is a part of the records of the addressee of this letter acquired in the ordinary course of its business and that the witness has sufficiently iden-

tified this as a part of such record and that it is admissible under the terms and provisions of the statute contained in 28 USCA Section 695.”

All other words used by the Court in that connection are stricken physically out of the record and the court’s reasons for admitting the document will remain in the form just stated.

You may proceed.

Mr. Hamlin: Call Mr. John Kniseley. [138]

JOHN M. KNISELEY,

called as a witness by and on behalf of the Libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your full name, please?

A. John M. Kniseley.

Q. Where do you live, Mr. Kniseley?

A. North Bend, Washington.

Q. What is your occupation?

A. I am a chemist.

Q. Employed by whom?

A. Laucks Laboratories, Incorporated.

Q. Are you an officer of Laucks Labs also?

A. Yes, sir.

Q. What office do you hold?

A. Vice President.

Q. What has been your professional formal education, Mr. Kniseley?

A. Ordinary grade and high school and graduated from the University of Washington with a degree in Chemical Engineering.

(Testimony of John M. Kniseley.)

Q. What year did you graduate? [139]

A. 1926.

Q. Have you pursued the occupation of a Chemical Engineer since that time? A. Yes, sir.

Q. Where? A. At Laucks Laboratories.

Q. What have been your duties,—just a summary of them, please.

A. We have been largely engaged in service to the public in a chemical engineering capacity.

Q. As a part of your work at Laucks Laboratories since 1926, have you had occasion to inspect foods? A. Yes, sir.

Q. How frequently would you say offhand you do that? A. Continually.

Q. Is that a daily occurrence with you?

A. That is right.

Q. What kinds of inspections do you make of foods,—for what purpose directly anyway?

A. To determine whether or not they are satisfactory for human consumption and whether or not they meet certain grades and qualifications which determine their price.

Q. Have any great proportion of these inspections been made of salt herring and allied products? [140]

A. I have inspected a great deal of salt herring, yes.

Q. Calling your attention to September 5, 1946, did you have occasion to inspect some half barrels of salt herring at the Bell Street dock in Seattle on that day? A. Yes, I did.

(Testimony of John M. Kniseley.)

Q. At whose request did you make this inspection? A. James Farrell & Company.

Q. Was anyone with you at the time of the inspection? A. I met Captain Perry.

Q. Where?

A. I don't recall exactly where. It was either at the dock or on the way to the dock. It was by arrangement that we met.

Q. Was anybody else there during the course of your inspection?

A. There was a man by the name of Pete Wahl.

Q. Do you know whose herring that was you were looking at? A. Apex Fish Company.

Q. Do you recall whether you went there during the day, or what part of the day was it?

A. It was in the afternoon.

Q. How many barrels were involved in this inspection?

A. The lot was designated as 971 half barrels, I believe. [141]

Q. How was your inspection carried out?

A. We selected at random certain barrels that showed evidence of some seepage of oil and other barrels that didn't show the evidence of seepage. Pete Wahl opened them for us and we examined the contents from both the top and the bottom. I say, "top" and "bottom" meaning that the fish are packed all belly up for the top and the back constituted the bottom.

Q. How did you go about inspecting them after the heads were off the barrels?

(Testimony of John M. Kniseley.)

A. Well, Pete reached down in there and got the fish out largely and handed them to us. We inspected them. We directed him just how far down we wanted him to examine and explore. It is rather a sticky proposition. Pete did the dirty work and we kept as clean as we could.

Q. What was the condition of the fish that you saw?

A. Well, this lot was in varied condition,—some barrels bad and some not so bad.

Q. What was the condition of the ones which you have designated as bad?

A. There was a layer of clear oil on the top of the barrels. The barrels were actually warm to the touch and the fish were warm to the touch. When you [142] examined the fish, there was a definite odor and the flesh of the fish was soft, and there was certain sluffing of scales,—every indication that they had been injured by elevated temperature.

Q. Did you measure the depth of the layer of oil on top of the barrel?

A. Only casual observation. There was no actual measurement with a ruler.

Q. Did you take any measurement of the temperature in any of the barrels in this shipment?

A. Yes, I did. I measured the temperature in the barrels. The highest temperature that I observed actually in the heart of a barrel was 77 degrees Fahrenheit.

Q. At what part of the barrel was that taken?

A. It was at about the heart of the barrel. I

(Testimony of John M. Kniseley.)

had a thermometer that was fifteen inches long and I thrust it clear down into the barrel.

Q. Did you take the temperature of the outside air at the dock at that time?

A. Yes. The normal temperature in that dock was 68 degrees.

Q. Did you go aboard the ship to inspect the compartment from which these barrels were taken?

A. Yes, I did.

Q. Did you take any temperature readings aboard the [143] ship? A. Yes, sir.

Q. In the compartment where these herring were taken from?

A. I would like to qualify that a little.

Q. Yes.

A. I was following Captain Perry around and he advised me that the Number 3 hold was where they came from. I had no first-hand knowledge that they came from Hold Number 3, but he advised me of that fact and I followed him down there and I did make observation of temperatures.

Q. Do you have a record of the temperature you took in Number 3 lower hold?

A. I don't have a written record of that but I have a memory of it.

Q. What was it? A. It was 80 degrees.

Q. Did you take the temperature of any other herring on the dock in order to check your observations?

A. Well, yes, I did. I measured the temperature in certain other barrels that had been standing on

(Testimony of John M. Kniseley.)

the dock in a comparable location to the ones that were in question and the temperature in those barrels was 65 degrees Fahrenheit. [144]

Q. Did you observe any correlation between the temperature of the barrels in this lot of 971 and the extent of the damage to the fish in the barrels?

A. There was a definite correlation between the high temperature and the bad fish.

Q. Are you able to advise the court from your experience as a Chemical Engineer whether or not the fish were in a state of decomposition which would have produced that high temperature, or would it be your conclusion that the decomposition was caused by the temperature?

A. I have never seen salt herring raise their own temperature due to decomposition. It has been my experience that they will decompose when stored in a room that is at high temperature, but I have had no reason ever to believe that they would spoil so rapidly that they would increase the temperature within the barrel unless they were very completely dried out.

Q. Were these fish dried out? A. No.

Q. Did you likewise make a later inspection of this shipment?

A. Well, I made an inspection of the balance of the lot. I might explain that the unloading of this thing [145] was interrupted at midnight, I believe, or 2:00 a.m., on the 5th. It subsequently was completed and then I examined the balance of the lot on September 26th.

(Testimony of John M. Kniseley.)

Q. What was the condition of that herring which you examined on September 26th?

A. It was soft and in poor condition.

Q. Did you examine each and every one of that balance or did you do that one at random also?

A. It was done at random.

Q. Did you find some that were good or was there some damage to everything you looked at?

A. Well, in this——

The Court: You may answer directly.

Read the question.

(Last question repeated by the reporter.)

A. I believe there was some damage to everything I looked at.

Mr. Hamlin: You may inquire, Counsel.

Cross-Examination

By Mr. Wakefield:

Q. Mr. Kniseley, what time was it on September 5th, [146] that you were down at the dock?

A. I don't recall the exact hour but it was in the afternoon about 3:00 o'clock, I would say.

Q. About three in the afternoon?

A. That is what I remember.

Q. Was it at that time that you took the temperature in the barrels? A. Yes.

Q. Was it at that time that you took the outside temperature? A. Yes.

Q. You said the temperature in the dock was 68 degrees. Was that under cover or out in the open?

A. That was in the dock, under the roof.

(Testimony of John M. Kniseley.)

Q. Inside of the warehouse or shed?

A. It was close to where the fish were stored.

Q. But that wasn't outside on the open dock?

A. No.

Q. How did you take the temperature in the hold of the ship?

A. I had this thermometer that I had been using in the fish and I was carrying it with me and I merely read it after having allowed time for it to reach equilibrium.

Q. Were you holding it in your hand or did you hang it [147] up on the wall or what?

A. It is a long thermometer and I held the top of it a long ways from the mercury bulb in my hand.

Q. Where were you standing?

A. At various places. We scrambled around in that hold quite a little.

Q. What I meant was, were you down on the deck or floor of the hold?

A. Yes. The time that I remember recording there this 80 degrees, and observing this 80 degrees, I was standing between two shaft alleys on the lower deck on the bottom of the ship.

Q. You were standing between the two shaft alleys and holding the thermometer in your hands?

A. By the top, yes.

Q. Did you have flashlights? A. Yes.

Q. Was there any one aboard the ship to take you down there or how did you get down in the lower hold?

(Testimony of John M. Kniseley.)

A. Well, I was with Captain Perry and the watchman, I believe, helped us uncover hatches and scramble down in there.

Q. Oh, the hatches were covered before you went down?

A. There were tarps on top of the hatches. I don't recall whether they were completely covered or not [148] but the ladder was covered.

Q. This watchman, was he the only one you saw aboard the ship? A. I believe so.

Q. You didn't go into any other hold, did you, other than Number 3? A. Not that I recall.

Q. While you were down there, Mr. Kniseley, did you look around the hold or make any other examination than the taking of the temperature?

A. We spent some little time in that hold. I don't remember exactly all that transpired there. It has been some time past. I didn't take written notes on the trip into the ship because——

Q. Was the hold empty at the time?

A. That I don't recall.

Q. I understood you to say, Mr. Kniseley, that judging from the condition of the herring when you examined it, that you were of the view that it had been injured by elevated temperature, is that what you said? A. Yes.

Q. You have had quite considerable experience with herring, haven't you, particularly when you first started your work some years ago?

A. Yes. [149]

Q. Can you tell us what temperature would be

(Testimony of John M. Kniseley.)

required in your opinion to cause a barrel of herring which was properly cured to break down or go to pieces or become soft and damaged?

A. I don't wish to evade giving you a direct answer and that is not my intent but I would like to explain that, if it is all right.

The Court: You haven't made any answer to explain yet.

Mr. Wakefield: I would like him to explain. That is what I am getting at.

The Court: The answer given in his direct examination, is that what you are inquiring about?

Mr. Wakefield: Yes. He said it was injured by an elevated temperature and I am now asking how much temperature in his opinion it would take.

The Court: Can you answer that question, responding to it directly in the form in which the question is put?

The Witness: It is difficult.

The Court: I believe you are called as an expert witness. I assume you can discuss a difficult question. I think you ought to answer the question.

(Last question repeated by the reporter.)

A. If I could get off the record for a minute, I could straighten out the problem which is in my mind.

The Court: All right. You may speak off the record and propound any question you wish to ask of Counsel with a view to clarifying the question in your mind.

The Witness: It is a question of time and temperature. The two cannot be divorced. When you

(Testimony of John M. Kniseley.)

asked me what temperature will injure, then you must ask me some length of time because they would stand a high temperature for a very short time and not spoil.

The Court: What you have just said is off the record.

The Witness: Yes.

The Court: Do you wish to modify the question in any way or do you wish to leave it as it is?

Mr. Wakefield: I will modify the question, Your Honor.

The Court: Very well. **On the record.**

Q. (By Mr. Wakefield): Can you tell us, Mr. Kniseley, your opinion as to the amount of temperature and the length of time the being subjected to that temperature would be required for a barrel of herring [151] properly cured to go to pieces and become soft such as you found in the herring in question?

A. I would estimate that it would require about five days at 77 degrees.

Q. About five days at 77 degrees? A. Yes.

Q. Have you ever made any actual tests to that effect? A. No, sir.

Q. Have you ever made any tests with herring to determine how much temperature for how long it takes to break down?

A. You mean laboratory tests?

Q. Yes? A. No.

Q. Going back to the same question which you answered "about five days at 77 degrees," would

(Testimony of John M. Kniseley.)

that answer require any qualification depending upon the degree of cure that the herring had been given? A. Yes, I believe so.

Q. Are you familiar, Mr. Kniseley, with the shipments of so-called Norwegian-cured herring; do you know what that cure is,—the hard-cure herring? A. I believe so.

Q. What would you say concerning the hard-cure herring and whether or not it would break down in about five [152] days at 77 degrees?

A. I believe it would.

Q. Have you had any experience with that and do you know anything about it or are you guessing about it?

A. I have had a good many years' experience with it.

Q. I am talking about the shipments of Norwegian herring that come from Norway to Seattle via the Panama Canal in ordinary stowage without refrigeration.

A. No, I haven't had too much experience with those shipments.

Q. Did you check this particular shipment of herring in question here as to the degree of salinity or the saline solution in the barrels?

A. No, I didn't.

Q. Isn't that an important factor in inspecting barrels of herring, to determine how much it has been cured or how strong a cure it has?

A. It is necessary to have heavy brine on them. But in this particular instance Pete Wahl stated

(Testimony of John M. Kniseley.)

that they were brined and I accepted his statement.

Q. You said it is necessary to have a heavy brine; just explain that further?

A. It is practically a saturated brine.

Q. Does that brine vary in degree or intensity from a mild brine to a heavy brine, or when you say brine [153] do you mean just one thing?

A. In my experience when we rebrine the herring we use practically a saturated brine and that was all there was to it.

Q. So the brine is more or less uniform, is that what you mean?

A. As far as the brine that you find on the fish. The brine that we put back into them was fairly uniform, yes.

Q. What then determines the degree of cure of a herring?

A. It is the amount of salt that is put on them.

Q. You do that when it is originally packed?

A. Yes.

Q. Then by the time you put this brine in that you are speaking of, this more or less uniform brine, the herring then has its cure? A. Yes.

Q. So the brine doesn't affect the cure one way or the other? A. No.

Q. From your experience with herring—this mild-cured—is it a commodity which is sensitive to or affected by the sun,—the heat of the sun?

A. The heat of the sun; yes, it is affected by the heat of the sun. [154]

(Testimony of John M. Kniseley.)

Q. Is it not a fact that the salt used for the curing of herring and the brine itself are,—I may state this awkwardly, but what I am getting at, they are factors or elements which are akin to refrigeration; in other words, don't they have characteristics of retaining cold?

A. I am not clear on that question.

Q. Specifically I want to know if the brine and salt such as you find in a barrel of herring would under ordinary circumstances retain the cold more so than say water or oil or other liquids?

A. More so than oil,—only slightly more so than water.

Q. Aren't those cooling agencies, that is what I am driving at,—the brine and salt, aren't those cooling agencies?

A. They are not a cooling agency.

Q. You would expect, then, that a barrel of herring packed with a mild cure and a barrel of water, side by side in the same temperature, would acquire the same amount of heat inside?

A. I am trying to avoid being technical on this thing and be practical on it. There are a number of different factors that affect that. I think the barrel of water,—if the fish had just water in the barrel, that it would get warm quicker, but not [155] because there was any cooling agency to the salt.

The Court: Did you ever make ice cream in a hand-turned freezer?

The Witness: Yes, sir.

The Court: Did you ever see salt used with the ice in that process?

(Testimony of John M. Kniseley.)

The Witness: Yes.

The Court: What effect, if any, does the salt have in that operation?

The Witness: It causes the ice to melt.

The Court: It causes it to melt and do what with respect to freezing the cream inside the freezer?

The Witness: It is the melting of the ice that cools and not the solution of the salt in the water.

The Court: It is your opinion that the salt does not retard the melting of the ice but on the other hand accelerates and causes a melting of the ice?

The Witness: It causes the ice to melt and it is the melting of the ice that absorbs heat.

The Court: You may inquire.

Q. (By Mr. Wakefield): The question of whether or not the berring of herring will generate its own heat, [156] I think you said that it wouldn't raise its own temperature. You are familiar with herring meal and fish meal? A. Yes.

Q. And that generates a whale of a lot of heat, doesn't it? A. That is right.

Q. As a matter of fact, it is subject to spontaneous combustion? A. Yes, sir.

Q. Fires frequently occur in the holds of ships from herring meal? A. Yes.

Q. Mr. Kniseley, don't you think that if a barrel of herring was not sufficiently or properly cured—by sufficiently I mean enough salt used—and by properly I mean a herring having feed in it or otherwise not being properly cleaned and pre-

(Testimony of John M. Kniseley.)

pared—and that barrel of herring stood around for two weeks, three weeks or four weeks and started to decompose, don't you think that after a lapse of time of say thirty days or three weeks that there would be some heat generated within the barrel from the process of decomposition?

Mr. Hamlin: That is objected to on the ground [157] it is entirely irrelevant and immaterial.

There has been no showing that there was any herring involved herein which had feed in it or which was improperly cured.

The Court: What is there about the record which entitles you to ask that question in your opinion, Mr. Wakefield?

Mr. Wakefield: That is one of our contentions, our Honor. He said on direct examination that herring won't raise its own temperature in the barrels. I am trying to find out what kind of herring he is talking about or under what conditions it won't raise its own temperature.

The Court: The objection is overruled.

The Witness: I will have to have the question read again.

(Last question repeated by the reporter.)

A. There would be some heat generated in the barrel, but not necessarily a rise in the temperature.

Q. (By Mr. Wakefield): Will you explain that last remark,—“not necessarily on a rising temperature” did you say?

A. There would not necessarily be a rise in temperature. [158] I am being a little technical here

(Testimony of John M. Kniseley.)

but you asked that question and I try to answer it the best I can. The barrel of herring is wet and the evaporation of water on the outside is a strong cooling action. To imagine that you could get enough bacterial decomposition in the center of the barrel to offset that strong cooling action is, to my mind, impossible.

Q. Are you assuming that this barrel of herring we are talking about is wet on the outside?

A. I believe I stated in my direct examination that if the herring were wet and had not dried out that then the temperature could not go up.

Q. Do you mean the outside of the barrel was wet?

A. Yes.

Q. Oh, I didn't understand that. So what you have testified to with respect to generating heat or raising the temperature has reference to a wet barrel?

A. That is right.

Q. Wet on the outside?

A. Wet on the outside because it is wet on the inside.

Q. But not to a dry barrel.

A. To a barrel that has water in it. Let me change it to that.

Q. What from your experience would be the range of temperature, [159] within how many degrees you want to give as a range, of a barrel of herring mild cured that was in a normal, proper condition inside?

A. I don't understand that, sir.

Q. Well, suppose you were up at Port Wakefield at the time herring was,—or you took a barrel

(Testimony of John M. Kniseley.)

of herring out of the warehouse at Port Wakefield and opened it up and took this same kind of a temperature that you say you took in the herring on the Bell Street dock, what range of temperature would you expect to find?

Mr. Hamlin: That is objected to as calling for a very hypothetical conclusion or guess on the part of the witness. There are not enough facts stated in that question upon which to base any answer.

The Court: If the witness understands it, he may answer.

A. I would expect the herring to be down below 70 degrees.

Q. (By Mr. Wakefield): That is quite a range. "Below 70" might be 60, 50, or 40. Can't you tell me what the normal temperature is in a barrel of herring in good condition that you would expect to find, that [160] is?

A. That depends entirely upon the outside temperature and the relative humidity of the air around the barrel and exposure to direct sun; also the velocity of the wind. There are so many factors that I can't tell you.

Q. Have you ever taken the temperature of other barrels of herring that you can recall?

A. Yes.

Q. Well, tell us what some of those were?

A. In the neighborhood of 60 or 70 on the dock when it is being worked.

Q. 65 to 70? A. Yes.

Q. How long, Mr. Kniseley, in your opinion,

(Testimony of John M. Kniseley.)

would it take a barrel of herring which was 70 degrees inside the barrel to spoil?

A. You mean to completely spoil?

Q. No; to the degree that you found this herring in question in this case spoiled, we will say.

A. It would take a much longer time. I am a little ambiguous on that. If you want me to guess, I will guess. I am not certain at all.

Q. Well, I am not pinning you down to definite days. I want to know in general. [161]

A. I would estimate between 30 and 45 days.

Q. Between 30 and 45 days? A. Yes.

Q. And the 77 degree herring you say would spoil in five days?

A. That is my opinion, yes.

Q. Suppose the temperature in the barrel was only 65, how would that change the length of time?

A. It would stretch it out quite a lot, I think.

The Court: Had you examined any other shipments of salt herring in barrels coming down from this same plant before this occasion?

The Witness: Years prior to that.

The Court: Years prior to that?

The Witness: Yes, sir.

The Court: Had you examined any other barrels of salt herring in other shipments coming from other Alaskan localities?

The Witness: Yes, sir. I don't know whether it is necessary to state it in the record but I was——

The Court: No. Just say whether or not you have.

(Testimony of John M. Kniseley.)

The Witness: Yes, I have.

The Court: You may inquire. [162]

Q. (By Mr. Wakefield): Mr. Kniseley, assume the situation of a barrel of herring improperly packed or improperly cured which is wet on the outside and loaded aboard a ship, and let's assume further that the inside temperature of the barrel is say 65 degrees and that within ten or twelve days the temperature of that same barrel is 77 degrees, an increase of 12 degrees, can you give us any estimation of how much heat it would have to have been subjected to during that 12 days to raise the brine temperature or the barrel temperature from 65 degrees to 77 degrees?

What I want to know is how high a temperature the outside air, or the air surrounding the barrel, would probably have had to have been to make that much increase?

A. Eighty degrees in the condition of a hold of a ship.

Q. Eighty degrees? A. Yes.

Q. For 12 days? A. Yes.

Q. Do I understand that the herring you examined on September 5th was not uniformly bad; some was worse than others, and some fairly good, was that what you said? A. That is right.

Q. Will you just explain the difference of what you meant by bad and others not so bad?

The Court: Were the last question and answer directed to this particular shipment here in question?

(Testimony of John M. Kniseley.)

Mr. Wakefield: Yes—that which was discharged on the 5th of September.

The Court: You may answer the question.

(Last question repeated by the reporter.)

A. The barrels that were the worst had this layer of clear oil on the top. The fish were decidedly soft and had slacked down in the barrel. Those that were not so bad—there was some separation of oil but it wasn't a clear layer, it was more white like a mulsified oil. The fish had not slacked down so bad, the odor wasn't so bad, and they were not near as soft when you broke them with your hand.

The Court: Did you find a varying degree of damage or did you find some barrels without any damage; what do you mean to say with respect to that if you have any information on that?

The Witness: I didn't find any that would have been considered, I don't think, top quality although some of them would have been considered fair, merchantable quality. [164]

The Court: You may inquire.

Q. (By Mr. Wakefield: With respect to the barrels that you examined on September 26th, the balance of the shipment, how did they compare with those that you examined on September 5th?

A. The condition was more nearly uniform. I didn't notice so many that were extremely bad. But they were all I believe worse than the best ones that I examined on September 5th.

Q. Did that same condition that you explained exist with respect to the oil and the softness of the fish?

A. Yes.

(Testimony of John M. Kniseley.)

Q. You made the statement, Mr. Kniseley, on direct examination as I recall, that there is a definite relation between the temperature and bad condition of the fish.

A. I believe that was with regard to this particular shipment.

Q. Well, isn't that true as to any herring; the temperature affects any herring, doesn't it?

A. Yes, it does.

Q. When you speak of temperature, do you have any particular kind of temperature in mind—anything other than atmospheric temperature is what I am [165] getting at.

A. Well, sir, of course, according to my mind temperature is a unit of measure and there aren't very many kinds of it. It is either at that temperature or it is not.

Q. Well, the sun's rays would be the kind of temperature you are speaking about?

A. The sun's rays are a source of heat.

Q. Let's suppose that the sun is out and it is 80 degrees; that is the kind of temperature you are speaking of, isn't it?

A. Well, the 80 degrees certainly is.

Q. What I am getting at, you made a reference in your direct examination to "a high temperature" which means any kind of a heat measurement.

A. Yes, sir. Anything which created that temperature would probably have caused the damage.

The Court: Did you make any notation of outside temperature on that dock at Bell Street on the days that you made these temperature tests?

(Testimony of John M. Kniseley.)

The Witness: Yes. I recorded the temperature alongside of the shipment and it was 68.

The Court: On the outside of the building or dock structure? [166]

The Witness: Not on the outside of the dock structure but beside where the herring was stored I made a temperature record.

The Court: How much was that outside temperature on the days when you made the inspection?

The Witness: In the dock it was 68.

The Court: Do you call that outside temperature; you say "in the dock"?

The Witness: No, that would not be the same temperature that I would get if I would go out on the apron of the dock, for instance.

The Court: That means inside the dock structure?

The Witness: Yes.

The Court: You didn't take the outside temperature outside of the enclosed wall of the dock structure, is that your statement?

The Witness: That is right. I did not.

The Court: You may inquire.

Q. (By Mr. Wakefield): How many barrels did you actually examine on the 5th of September?

A. I think I opened ten or twelve barrels.

Q. Did you take the temperature of all of those?

A. I believe I did. [167]

Q. I think the figure of 77 degrees which you gave us you said was the highest or maximum?

(Testimony of John M. Kniseley.)

A. That is right.

Q. What other temperatures did you get in the other ten or twelve barrels?

A. I got varying temperatures between 70 and 72, and 77.

Q. How many were at 70?

A. I didn't make a record of each barrel. I merely went along with my thermometer and I was reading maximums, and minimums, and searching for the highest and the lowest.

Q. Did you have one barrel at 77 or two barrels, or how many barrels at 77?

A. I believe I actually found one barrel at 77.

Q. Just one barrel? A. Yes.

Q. How many were at 70?

A. I think I found one at 70.

Q. How many at 72?

A. I don't recall exactly.

Q. But the temperature on the ten or twelve barrels that you actually examined varied from 70 to 77? A. That is right.

Q. And you recall that only one out of that number was [168] 77? A. Yes.

The Court: Unless each counsel would object to doing so, I would be glad to know if this witness has an expert knowledge or opinion concerning the difference in outside and inside temperature at this dock on the days that he was making this test.

Of course, if Counsel object to bringing that out, they need not ask the question.

(Testimony of John M. Kniseley.)

Mr. Wakefield: I have no objection.

Q. (By Mr. Wakefield): Can you tell us what the outside temperature was in comparison to the 68 you found in the dock?

A. I don't know. To be frank with you, I didn't consider it important because the problem I had in mind was could those herring have acquired the temperature from standing in that dock?

The Court: Were any of the herring barrels stowed temporarily on the dock structure outside of the structure's enclosing walls?

The Witness: None that I saw.

The Court: Then the question is not material.

You may proceed. [169]

Q. (By Mr. Wakefield): I don't think, Mr. Kniseley, I quite understood what you mean by taking the temperature of other barrels on the dock.

You said something about 85 degrees. What was that?

A. Well, I took the temperature of the dock and then the herring will normally be some few degrees lower than the temperature of the dock, depending on the relative humidity of the air, and I wanted to know just what temperature a barrel sitting on that dock would acquire if it had time to reach equilibrium, so I hunted up a barrel that had been there for some time and opened it up and took its temperature. It was 65 degrees.

Q. You say it had been there for some time?

A. That is something I was informed of by Pete Wahl.

(Testimony of John M. Kniseley.)

Q. That wasn't one of the barrels out of this shipment? A. That is right.

Q. But you don't know how long it had been there or anything about this particular barrel?

A. Nothing more than what Pete Wahl told me.

Q. This barrel that you found to be 65, did you make any other tests as to the degree of salinity of the brine or any conditions like that?

A. No. It was merely a guinea pig to see what temperature [170] a barrel would reach, setting on that dock.

Mr. Wakefield: I think that is all. Thank you.

The Court: Did you ever walk along the waterfront on a warm summer day in Seattle and experience the outside heat on your body?

The Witness: Yes.

The Court: Did you ever, then, immediately while sensing outside atmospheric heat walk inside of the dock within the enclosing walls and within the shed of the dock?

The Witness: Yes.

The Court: Did you experience any change in your body temperature?

The Witness: It always felt cooler to me.

The Court: How much cooler would you say?

The Witness: (No response.)

The Court: Or express it in another way. How long did it take you to experience a feeling of bodily cooling in your bodily temperature after walking under the walls of the dock shed?

(Testimony of John M. Kniseley.)

The Witness: A comparatively short time.

The Court: Have you any opinion as to how much the difference was or customarily is between outside summer heat in Seattle and the temperature [171] inside of the dock's enclosing walls and underneath the shed roof of the dock?

The Witness: It would depend a great deal upon the structure of the dock and all, but I would estimate it to be between 5 and 8 degrees.

The Court: You may inquire.

Mr. Wakefield: May I ask one or two questions which I overlooked?

The Court: You may do so.

Q. (By Mr. Wakefield): Mr. Kniseley, you said you arrived there about 3:00 in the afternoon. I take it that the barrels of herring were inside of the dock structure at the time you arrived there.

A. Yes.

Q. Do you know when they were put in there?

A. No, I don't.

Q. You don't know how long they had been inside? A. No.

Mr. Wakefield: That is all.

Redirect Examination

By Mr. Hamlin:

Q. Mr. Kniseley, in the situation which the court suggested [172] to you, namely, walking along in the sunlight and feeling warm, the heat which your body might attain by reason of being in the direct rays of the sun would not necessarily

(Testimony of John M. Kniseley.)

be the same as the atmospheric temperature, would it? A. That is correct.

Q. In other words, your body would be receiving heat because it was placed in the rays of the sun which are light rays and convey heat 93 million miles away from the sun, isn't that true?

A. That is right.

Q. But they do it without warming the air in passing through it, isn't that correct?

A. It is possible that they can go through the air without raising its temperature too much.

Q. Well, I am assuming air that has no dust particles or other such matter in it.

A. Yes.

Q. Are you familiar with the way temperatures are taken of outside atmosphere? Perhaps I should explain. I mean are thermometers placed in the sunlight or in the shade when taking atmospheric temperature outside?

A. Always in the shade.

Q. I believe you answered the court's inquiry that the [173] temperature inside a dock or other structure might possibly be warmer than it is outside. I wish you to tell us the process whereby you arrive at that conclusion, too.

The Court: I believe the witness said he thought it would be cooler on his body inside the dock structure.

Mr. Hamlin: Yes, that is true. I understood—am I correct in this—that the witness also said that the atmospheric tempearture might be warmer inside the structure. Is that correct?

(Testimony of John M. Kniseley.)

The Court: I didn't get that impression but maybe you would be justified in getting that impression. I personally did not get that impression.

The Witness: I don't recall that.

Q. (By Mr. Hamlin): Can you explain to us now the process whereby the temperature of the air is raised by the heat from the sun?

A. The temperature of the air raised by the heat from the sun?

Q. Yes; how does that occur?

A. The heat from the sun is entirely radiant heat. It must strike some object, be absorbed and raise the temperature of that object. Then, if that object [174] in turn transmits heat to the air by convection, it can raise the temperature of the air.

The Court: May I ask you directly if in your examination and inspection of these barrels you attributed any of the elevated temperature you found to outside summer atmospheric temperatures; did outside summer temperatures in any way affect the temperature of this herring which you found it to have in the barrels at the time you examined it?

The Witness: I don't think on the day of September 5th that it had any affect on those barrels.

Q. (By Mr. Hamlin): Mr. Kniseley, I think you stated that it was the salt and not the brine which determined the cure of salt herring.

When you explained that, did you mean the hard salt which was placed on the fish or the amount of salt in the brine?

(Testimony of John M. Kniseley.)

A. The fish are salted and the salt draws water out of the fish so that after it has been cured for some time the brine reaches a certain equilibrium. It was the condition of that brine after equilibrium that I was referring to.

Q. Is it true that the chemical process which goes on, [175] —will you explain what the chemical process is which goes on as the fish are cured?

A. The process of dehydration.

Q. Is that anything like the process which is known as osmosis?

A. That is the mechanism by which the process proceeds.

Q. Will you state exactly what it is that occurs in this osteomatic process?

A. It is a fundamental truth in nature that water will travel from a dilute solution to a more concentrated one. They put enough salt in so that the brine is more concentrated than the solutions that are in the fish.

The Court: At this point the court will take a 5-minute recess.

(Recess.)

The Court: You may resume the redirect examination.

Q. (By Mr. Hamlin): Mr. Kniseley, I am going to ask you to assume a cargo of barrels of salt herring piled in the ordinary fashion in the hold of a ship. I am going to further ask you to assume that the hold of the ship has an atmospheric temperature [176] above that of the barrels of salt

(Testimony of John M. Kniseley.)

herring. I am going to ask you to assume that the herring is carried in that hold for a period of approximately twelve days and ask you whether the barrels piled therein would in that period attain a uniform temperature in each barrel?

A. I don't think they would.

Q. Will you explain why?

A. The mechanism by which the barrels reach equilibrium with the surrounding temperature in the hold of the vessel is largely by convection. That consists of the cold air which would become cold by being in contact with the herring barrels dropping to the bottom of the ship and traveling sideways to some hot surface, and when it came in contact with that hot surface it would tend to rise like a chimney and when it went up it would come in contact with more cold fish and it would go around and around like a windmill. That is the actual mechanism by which the heat is conveyed. That naturally could not take place uniformly throughout the hold of the vessel.

Q. Do such currents normally reach every portion of an enclosure or are they affected in some way by what is within such an enclosure? [177]

A. They normally seek a path of least resistance and that is a haphazard path or channel—wherever the stowage would direct it.

Q. You had some discussion with counsel about wet barrels and dry barrels.

I ask you whether any wooden barrel containing water would fit within your classification of a wet barrel or a dry barrel?

(Testimony of John M. Kniseley.)

A. A wooden barrel full of water I would refer to as a wet barrel.

Q. Would that same apply to a barrel containing herring in a brine solution? A. Yes, sir.

Q. Why would you call it a wet barrel?

A. Because a half-inch barrel stave couldn't be wet on the inside and totally dry on the outside.

Q. How does it get wet on the outside?

A. By a process of penetrating through the wood. The water actually goes in solution in the wood.

The Court: Until it gets how far—until it gets to the outside of the wood?

The Witness: Yes.

The Court: And there what happens to it?

The Witness: It evaporates.

The Court: What makes moisture appear on [178] the surface of a glass?

The Witness: That moisture comes from the air.

Q. (By Mr. Hamlin): Are you referring to a glass colder than the atmospheric temperature?

A. Yes. Otherwise, there would be no moisture on it.

Q. That is condensation, is it? A. Yes.

Q. I think you mentioned that these wet barrels would have a tendency—the water would evaporate from the outside, is that true?

A. That is correct.

Q. And for a period that would have a cooling action?

(Testimony of John M. Kniseley.)

A. As long as that evaporation took place, there would be a definite cooling of the contents of the barrel.

Q. What would happen to that evaporation factor in an enclosed area such as the hold of a ship; would it continue throughout a period of twelve days? A. No.

Q. What would happen?

A. As soon as the air had absorbed as much water as it could contain, which is a relatively small amount, then all evaporation would cease and cooling would cease. [179]

Q. What would happen to the temperature of the barrels of salt herring in such an enclosure, the sides of which were warmer than the barrels, after evaporation stopped; would that have any effect upon the barrels' absorption of heat?

A. The barrels would tend to reach equilibrium with their surroundings.

Q. Would it affect the speed with which the temperature would change in any way after a saturation point was reached?

A. Yes, of course.

Q. In what way?

A. The elevation of temperature is the result of two things, the amount of heat put in and the amount of heat taken out. And the elevation of the temperature is the difference. If there is no heat taken out, the temperature naturally goes up when heat is put in.

(Testimony of John M. Kniseley.)

Q. You have testified at length about the bringing of herring under Counsel's questioning.

Will you state what experience, if any, you have had in the matter of applying brine to salt herring?

A. I was employed for a number of years as a recooper—rebrine man on the Seattle Waterfront.

Q. For how many years were you so employed?

A. Off and on over a period of six years.

Q. What were your duties as a cooper and rebrine man?

A. We opened the barrels and examined brine—to see if it was high enough, and examined the fish and did mechanical work about the barrel, repaired it, bored a hole in the barrel and poured brine in it and rebunged it and rolled them around.

Q. Was it a part of your duty to measure the amount of brine necessary in that work?

A. We always figured on a tight barrel. We always filled them full.

Q. A saturated solution, do you mean?

A. The solution was usually about 90 per cent saturated.

The Court: The answer is not a direct answer to the question. It seems to me the question remains unanswered. He has discussed the question but he hasn't answered it.

Q. (By Mr. Hamlin): I think the question was whether it was a part of your duties to ascertain the proper strength of brine to put in the barrel.

A. That actually was not a part of my duties at that time.

(Testimony of John M. Kniseley.)

Q. Has it ever been since? [181] A. No.

Q. I think you were describing the procession of osmosis which takes place when fish are placed in brine and salt when we took a recess.

Do you wish to say anything more about that process—about the mechanics of it?

A. I don't recall exactly what I did say.

Q. What process takes place when salt is placed on the herring and they are then put in brine in an enclosed barrel?

A. The fish commence to dehydrate.

Q. The name of that process again, is what?

A. By the process of osmosis.

Q. And mechanically what happens to the cells of the fish in that process?

A. They liberate the water from the cells of the fish and it goes into the brine.

The Court: Do you mean it becomes the brine when that moisture is mixed with the salt?

The Witness: Yes. It dissolves the salt and makes brine.

Q. (By Mr. Hamlin): I want you to assume a brine having a strength of 85 per cent solution is placed in a barrel of salt herring at the time of repacking [182] and that the barrels are permitted to stand for a period of from 12 days to a month, would any change occur in the strength of the brine solution during that period?

A. I believe it would.

Q. What would that change be?

A. As the fish liberated water and diluted that brine, it would become weaker.

(Testimony of John M. Kniseley.)

Q. What effect would that have on the strength of the brine solution?

A. It would appear to be weaker.

Q. Let's assume further that the particular herring involved in my last questions were caused to deteriorate through subjection to excessive heat, what effect would that have on the strength of the brine solution during that period?

A. The process of deterioration; it liberates moisture from the fish and that would dilute the brine.

Q. Would it dilute it more so than if the fish did not spoil? A. That is correct.

Mr. Hamlin: I think that is all. [183]

Recross Examination

By Mr. Wakefield:

Q. Mr. Kniseley, in answer to a question propounded by the Court you replied, as I understood you, that you didn't think the conditions existing on September 5th had anything to do with the temperature of the fish as you found it.

As I understood the court's question, it was whether or not outside summer temperatures would have any effect on the barreling of herring.

Did you mean to say that no outside summer temperatures would have any effect or merely that on September 5th it didn't have effect on what you actually found?

A. I meant that—I was trying to confine my answer, so it wouldn't be ambiguous, to September

(Testimony of John M. Kniseley.)

5th, and the conditions which existed there. I didn't want to make any comment about outside summer temperatures. I think everybody knows that if it is hot and the fish are out there, it will get hot.

Q. Would you tell us why you took the temperature in the center of the barrel instead of on the outside ring—I don't mean on the outside of the barrel but close to the outside of the inside.

A. I took it there because I thought that would more nearly represent the temperature of the fish as distinguished from the rim around there that was having this cooling process going on all of the time.

Q. If there is heat in the barrel and it doesn't come from inside from decomposition, it has got to come in from the outside, doesn't it?

A. Yes, sir.

Q. So, how would the center be hotter than the outside; I don't understand it.

A. The barrel must have been warmer at one time than it was at the time that I observed it because of the fact that the high temperature was in the center.

Q. Did you take the temperature any place but the center? A. Yes, I did.

Q. What did you find on the outside?

A. Along the outside it approached the temperature of the dock.

Q. Did you actually take those temperatures?

A. Yes.

Q. What was the range of them?

(Testimony of John M. Kniseley.)

A. They ranged around 70. Practically all of the barrels were about 70 on the outside.

Q. In taking these temperatures and making your inspection, you testified on direct examination, as I recall, that [185] you selected the oily barrels. What would an oily barrel indicate?

A. That it had spoiled.

Q. And this oil would be apparent where?

A. Oh, there were signs of it seeping around the head.

Q. In other words, that is a leakage of oil from the inside of the barrel to the outside?

A. A wooden barrel will hold water but it won't hold oil hardly at all.

Q. So you actually selected the worst barrels, did you not? A. Yes.

Q. When Mr. Hamlin was asking you about your experience with herring, actually working as a cooper or rebriner, you started to tell us about 90 per cent solution and then you didn't go on with it. Is that the per cent solution of the brine that you used? A. In rebrining, yes.

Q. 90 per cent? A. Yes.

Q. Was that with relation to mild cure or Scotch cured herring? A. Yes.

Q. Do you think a 90 per cent solution is correct? [186]

A. Well, this was a rebrining operation—just refilled to bring the fish more or less to the condition that the market demanded. That was the

(Testimony of John M. Kniseley.)

practice. Whether it was correct or not would depend upon what results they wanted.

Q. "What result they wanted" what do you mean by that?

A. The fish are sold subject to approval of the buyer and the intent there always was to make your fish look as good as you could, and that is what we did use.

Q. The 90 per cent solution. Well, what would have been the result, as you recall it, if you had used an 85 per cent solution?

A. I don't think there would have been so terribly much difference.

Q. Supposing it was 80 per cent?

A. Well, as you go down the scale you lose your preservative action.

Q. You lose your preservative action the more you go down from 90? A. Yes.

Q. Ninety per cent, would you say was an average mild cure?

A. I think it was hard to get it saturated and 90 per cent was good enough and that is what we used.

Q. As a matter of fact, are you familiar with the [187] mild cured salmon that is being put up in Alaska; did you examine any of that?

A. Yes, I have examined it.

Q. Do you know what percentage solution they used in the mild cured salmon?

A. I don't ever recall rebrining mild-cured salmon.

Q. Mr. Kniseley, do you ever put more than 90 per cent—say 92, 93 or 95 or 100 per cent in herring? A. I don't recall.

Q. In speaking of the cooling process or—I think what we really mean is the other way around—the absorption of heat. You mentioned several times about barrels reaching their equilibrium with the surrounding temperature.

How long, in your opinion would it take a barrel that was, say, 65 degrees inside to reach 70 degrees if it was kept in a room at 70 degrees?

A. I just simply can't answer that question without further qualification because it might never reach there.

Q. Well, then, it isn't a fact that a barrel of herring will always reach the surrounding temperature, is that right?

A. That is a fact; it will not always reach the temperature of its surroundings. [188]

Q. Let's get it this way. Whatever the process is, heat absorption or cooling, whichever way you want to speak of it, is that a slow process or rapid or how does it take place?

A. It is not such a terribly slow process. The elevation of the temperature may be very slow. If all you are getting is elevating the temperature by the difference between the amount put in and the amount lost, which the difference in some cases isn't anything. In some cases they reach equilibrium, oh, as much as five degrees below room temperature. Then the elevation of temperature would be in hundreds or maybe none at all. But

(Testimony of John M. Kniseley.)

if the relative humidity in the room rises so that the rate of evaporation decreases, then the elevation of temperature may be fairly rapid.

Q. One other point. You said the outside temperatures such as Weather Bureau Reports and what-not are temperatures taken in the shade.

Have you any ideas or do you know what the normal difference would be between that temperature taken in the shade and the temperature taken out in the sun on an ordinary clear sunny summer day?

A. That would depend entirely on what kind of a [189] thermometer you had. If you had a Mercury Thermometer with a bright shiny bulb, it might show 50 degrees. If you had an alcohol thermometer with a red bulb, then it wouldn't be nearly as much. If you had some other type of bulb, then the difference would be still different.

Q. What would you think would be the minimum difference? The maximum I take it is about 50 degrees with a mercury bulb. What would you think the minimum difference would be on any kind of thermometer?

A. That would depend entirely on how hard the sun was shining, the day of the year, the hour of the day; there are so many factors, that I can't answer.

Q. So, it would be considerably hotter, would it not? A. Outside than inside?

Q. No. In the sun as against the shade?

(Testimony of John M. Kniseley.)

A. I think in the sun is always hotter than in the shade, yes, sir.

Q. I know it is hotter; but I mean it would be a lot hotter, wouldn't it?

A. Again I can't answer. It would depend on the sun. In some places it would be 50 degrees.

Mr. Wakefield: That is all.

Mr. Hamlin: I have just one other question.

The Court: Is it only one question you wish to ask?

Mr. Hamlin: Yes, your Honor.

The Court: The Court permits you to ask one more question only.

Further Redirect Examination

By Mr. Hamlin:

Q. You said when you looked at this herring, some of it was of fair merchantable quality. Did this herring which you have identified as fair merchantable quality show any evidence of damage and, if so, what was it?

A. Yes, it did. Excuse me, I didn't hear the rest of it.

Mr. Hamlin: I asked "If so, what was it"?

The Court: There was a further part to the question.

A. (Continuing) The fat was somewhat eliminated on the fish. The fish were somewhat soft but not to the extent where they wouldn't be merchantable.

The Court: Does this question cause the other

(Testimony of John M. Kniseley.)

side to feel that a further question should be asked?

Mr. Wakefield: No, Your Honor.

The Court: You may be excused from the stand.

(Witness excused.)

The Court: Call the next witness.

Mr. Hamlin: Captain Perry.

The Court: Come forward.

L. C. PERRY,

called as a witness by and on behalf of Libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your full name, please?

A. L. C. Perry.

Q. Where do you live, Captain Perry?

A. Seattle.

Q. What is your occupation?

A. I am a marine surveyor. [192]

Q. Will you state the experience you have had in the business of a marine surveyor and any other experience which may be pertinent thereto?

A. Well, I started to sea in 1913 as apprentice seaman and progressed—able seaman, able-bodied seaman, and was in the World War about 1917 in the United States Navy. I went back to the Merchant Marine, became a Mate and finally Master of Ships.

In 1930 I went with the Board of Marine Underwriters in San Francisco on station at Seattle as

(Testimony of L. C. Perry.)

a Marine Surveyor. I remained with them until 1946 when I opened my own office and became what is known as an independent surveyor.

Q. During this period from 1913 to the present time, have you been continuously connected with ships or have you been in some other business?

A. I have been continuously connected with vessels.

Q. Do you have any personal knowledge of salt herring?

A. Oh, just from the fact that being of Scandinavian extraction, we have had it at home for pickling purposes, that is about all.

Q. Have you ever prepared it?

A. Yes, I have prepared it personally.

Q. I will ask you whether on September 5, 1946 [193] and thereafter you surveyed an alleged cargo loss at Bell Street Dock consisting of a shipment of 1358 barrels of salted herring?

A. Yes. On that date there were only 971 on the dock but the total amount was that figure that you quote.

Q. Who requested you to make this survey?

A. James Farrell & Company of Seattle.

Q. Whose cargo was it, do you know?

A. It belonged to the Apex Fish Company.

Q. What time of the day did you go there to first start your survey?

A. I believe it was about 10:30 in the morning.

Q. Who else, if anyone were present at the time of your survey?

(Testimony of L. C. Perry.)

A. Well, during the course of the survey there were a number of persons but at the beginning Pete Wahl and I were there. In the afternoon Mr. Kniseley came and later on Mr. James Gow of Alexander Gow & Company came.

Q. Calling your attention to this portion of the shipment consisting of 971 barrels, did you look at each and every one of those and examine them?

A. Eventually we looked at each and every one of them.

Q. State how the examination was carried on of this 971? [194]

A. Well, Pete Wahl who did the physical work of opening them—he would open them and segregate them as to good or bad and fair and then we would go along and from personal observation we would note each barrel. Those that were unfit for human consumption or condemned, why, we reversed the heads of them and placed them on the dock. Those we thought had some value or could be sold for salvage we placed into the cold storage.

Q. Were you present when Mr. Kniseley made his temperature readings? A. I was.

Q. Will you describe, please, the actual physical condition of the herring which you observed on this occasion?

A. Well, some of it was in very bad shape. By that I mean that oil was standing on the top of the kegs; and upon handling the fish itself, the flesh of the fish would disintegrate which

(Testimony of L. C. Perry.)

showed us that that herring wasn't of any value. It also had a distinct odor so that we called it bad. Then that that the flesh had some firmness to it and there wasn't as much oil on the top of the keg, we would place that in another category, and that way we made different sets of it—bad and [195] fairly good, if you want to term it that.

Q. Do you recall how many barrels of this entire shipment were adjudged unfit for human consumption?

A. I don't recall offhand from memory. I have records of how many there were.

Q. Do you have the record with you?

A. I have.

Q. Of what does that record consist?

The Witness: What was the question previous to the last?

(Question repeated by the reporter as above recorded.)

Q. Do you recall how many barrels of this entire shipment were adjudged unfit for human consumption?

A. Six hundred thirty-two.

Q. Where they made up of halves or quarters?

A. They were of halves and quarters.

Q. Do you have the numbers of each?

A. The halves show 198; the quarters 80.

Q. That is from one of the holds?

A. That is from number 4 hold. And 354 in number 3 hold.

The Court: Are those 354 in addition to the 632 you first mentioned?

(Testimony of L. C. Perry.)

The Witness: No. Those two figures make [196] the total of 632.

Q. (By Mr. Hamlin): Those 354 which you have mentioned from number 3 hold, were those halves or quarters?

A. 354 halves were ruined.

The Court: The 354 half-sized barrels found in number 3 hold were what?

The Witness: Ruined.

The Court: Damaged to the extent of being—

The Witness: Unfit for human consumption.

Q. (By Mr. Hamlin): Those, when added to the 278 you mentioned before, make up the total of 632, do they not?

A. Yes, that is correct.

Q. Did Mr. Gow examine those 632 barrels with you?

A. Yes. He examined right along with us.

Q. Did you and Mr. Gow discuss what should be done with them?

A. Yes, we discussed it.

Q. Did you come to any agreement in that respect?

A. Well, with these barrels that were ruined, we contacted the Sound Reduction Company to see if we could realize some value from the oil and meal but they were reluctant at taking them because they claimed [197] the salt would clog their machinery or something. Finally, we prevailed upon them to take them and we gave them the barrels as kind of an incentive to take them because if they didn't take them from us we would have to dispose of them and just thereby create

(Testimony of L. C. Perry.)

another expense which we were endeavoring to minimize.

Q. Do you have a record there of the temperatures which you and Mr. Kniseley took there that day?

A. Yes, I have the notes that I took on September 5th.

Q. Will you state the temperature you found in the barrels of herring in this 971 lot?

Mr. Wakefield: I think I could properly object to that unless he took the temperatures. Mr. Kniseley has already stated he took them. It is incompetent.

The Court: That objection is sustained without objection to your asking him what temperatures did he use or consider in connection with his inspection. He has used the figure—apparently an over-all figure which I would like broken down again for the convenience of making any notes.

I failed to get the last figure he used—nine hundred and some odd. I want to know what relationship that bears, if any, to the six hundred [198] fifty-two bad condition barrels first mentioned.

Mr. Wakefield: May I make a statement which I think would clear that up, your Honor?

The Court: All right, you may.

Mr. Wakefield: Number 3 lower hold had 971 barrels total in it.

The Court: Of which 354 were unfit for human consumption in accordance with this witness' statement.

(Testimony of L. C. Perry.)

Mr. Wakefield: That is correct.

Number 4 lower hold had the balance of the shipment.

The Court: Of the 632?

Mr. Wakefield: No. Originally there were loaded in number 4 hold 387. So the shipment consisted of 387 barrels in number 4 hold and 971 in number 3 hold.

The Court: Of this number of 387, how many, if any, were characterized by this witness as being unfit for human consumption?

Mr. Wakefield: 198 half barrels.

The Court: Of which 198 half barrels were unfit for food?

Mr. Wakefield: And 80 quarter barrels.

The Court: And 80 quarter barrels were unfit [199] for human food.

That answers my inquiry.

If there is anything else you wish the witness to state, I will hear him.

Q. (By Mr. Hamlin): Did you personally look at the thermometers which Mr. Kniseley used in taking the temperatures? A. I did.

Q. Is ask you again, then, what temperatures was found in the barrels which you so tested in this 971 lot in hold number 3?

The Court: If he can state the answer to that question within his present knowledge.

Mr. Hamlin: Yes.

A. On the original records from my notebook, it notes temperatures of 73 to 77 degrees Fahren-

(Testimony of L. C. Perry.)

heit. Mr. Kniseley was handling the thermometer and getting it full of fish gore and I was taking the notes. That is the way it worked.

The Court: These were the temperatures inside the barrels, is that right?

The Witness: That is correct, sir.

Q. (By Mr. Hamlin): What part did you take, if any, in [200] the measuring of the temperature within the lower number 3 hold of the Denali that day?

A. Well, Mr. Kniseley handled the thermometer. We both had flashlights and we both played it on the thermometer and read the figure "79 degrees Fahrenheit."

The Court: Where was that?

The Witness: In number 3 lower hold between the shaft alleys.

The Court: Was the temperature in number 3 lower hold between the shaft alleys?

The Witness: Yes, sir. That is where the cargo was stowed.

The Court: You may proceed.

Q. (By Mr. Hamlin): How long did it take you to conclude your inspection of the 971 barrels which came from lower hold number 3?

A. I think it was three or four days before we got the whole thing inspected.

Q. Upon the conclusion of your inspection of that portion of the shipment, are you able to state what you found with respect to the remaining 617 barrels after having ascertained that 354 of them

(Testimony of L. C. Perry.)

were unfit for human consumption; what was [201] the condition of those 617 barrels?

A. Well, they had some value and could be disposed of we thought, so we placed them into cold storage.

Q. You say "we". Now, who is "we"?

A. Mr. Gow and the people who were interested. We got the benefit of Pete Wahl's opinion and talked to Mr. Farrell and all concluded that was the best thing to do for the interests of all was to put them in cold storage, so they would not deteriorate any further until we could dispose of them if we were successful in doing so.

Q. Where were they stored in cold storage?

A. Bell Street Dock.

The Court: What number of barrels is mentioned in this statement or is referred to in this statement?

Mr. Hamlin: 617, your Honor.

Q. (By Mr. Hamlin): Why is it that you didn't make an inspection of the balance of the shipment which was in number 4 hold at that same time?

A. Well, after this herring was discharged from number 3 hold, we had a Maritime strike and the vessel was tied up due to that and it was, I believe, towards the end of the month before they went back to work [202] and discharged number 4 hold.

Q. You did make a survey of the balance of the shipment in number 4 hold, did you not?

A. Yes, sir.

Q. Do you recall when that was done?

(Testimony of L. C. Perry.)

A. Well, that was—I believe it was September 26th.

Q. Did anyone attend with you at that inspection?

A. I believe Mr. Gow was along on the dock. We were on and off together more or less.

Q. How did you examine that portion of the cargo?

A. Similar to number 3, by having the kegs opened and segregated. Pete Wahl would segregate them and then we would go along and inspect them on our own and confirm what he said. If there was some doubt, we would discuss it and finally come to a definite conclusion.

The Court: How many barrels were involved in this remainder of the balance in this number 4 hold which you inspected on September 26th?

The Witness: 387.

The Court: Were those then regarded as still fit for human consumption?

The Witness: No, sir. Of those, 198 half barrels were not considered fit for human consumption, which left 79 half barrels that were questionable [203] whether we could derive some salvage from them. Then there were 80 quarter barrels that were ruined and thirty that were questionable, giving us a total of 387 in the hold of which 278 were not fit for human consumption.

The Court: 278?

The Witness: Correct. There were 109 on which we had some question of whether maybe we could salvage them.

(Testimony of L. C. Perry.)

The Court: At this time Court will be in recess until 2:00 o'clock.

(At 12:10 o'clock, p.m., Wednesday, July 14, 1948, Court recessed to 2:00 p.m., in the United States Court House.) [204]

Seattle, Washington

July 14th, 1948, 2:00 o'clock, p.m.

(All parties present as before.)

The Court: The taking of testimony may be resumed in the case on trial.

L. C. PERRY

(Resumed)

Direct Examination—(Continuing)

By Mr. Hamlin:

Q. Where is number 3 hold located on the S.S. Denali?

A. Number 3 hold is the hold just abaft of the engine room compartment.

Q. Where is number 4?

A. It is abaft of number 3 or the last hold.

Q. Directing your attention to the entire shipment of 1358 barrels of salt herring involved in this action, I ask you if any portion of that entire shipment was found by you to be in an undamaged condition? A. No, it was not. [205]

Q. Did you observe any difference in the condition of the herring found in hold number 4 from that in number 3?

A. On the average, and the impression that I

(Testimony of L. C. Perry.)

got, was that number 3 was a little more damaged than we saw in number 4.

Q. Captain Perry, would you state your opinion as to specifically what condition caused the damage which you found in this entire shipment?

Mr. Wakefield: I object to that first on the ground that the witness has not been shown to be qualified to express an opinion as to the cause of damage to the herring. Well, that is my objection.

The Court: The objection is sustained with leave to further inquire of the witness' qualifications.

Q. (By Mr. Hamlin): What has been your experience with the inspection of cargoes of salt herring prior to that as to which you have just testified?

A. Well, I have inspected some but specifically I couldn't tell you when.

Q. I think you testified that some of these barrels had a layer of oil on the top of the barrels.

A. That is correct. [206]

Q. I am asking you to state just yes or no, if you know, what it is that causes oil to rise to the top of the barrels of salt herring.

Mr. Wakefield: 'The same objection, if the Court please.

The Court: The objection is overruled.

A. Yes.

Q. (By Mr. Hamlin): What particular information in your possession enables you to say that you know what causes oil to rise to the top of the barrels of salt herring?

(Testimony of L. C. Perry.)

A. Well, it is just the simple fact that oil will go on top of water and the oil in the barrel will rise to the top.

Q. Is oil normally floating on the top of the barrels of salt herring in good order?

A. No, it is not.

Q. Where is the oil located within the barrel?

Mr. Wakefield: Objected to, your Honor.

The Court: State all of the conditions in the question. Subject to that qualification of the question, the objection is sustained.

It is obvious to the court that you have not stated all of the conditions which you have in mind.

Q. (By Mr. Hamlin): Do you know where the oil came from that was floating on the top of the barrels? A. It came from the fish.

Q. Do you know what would cause the oil to leave the fish and go into the water?

Mr. Wakefield: I object to that on the ground the witness has not been shown to be qualified to testify.

Mr. Hamlin: I am asking him if he knows.

The Court: The objection is overruled.

The answer should be yes or no—whichever is the fact.

A. Yes.

Q. (By Mr. Hamlin): Upon what information do you base your reply that you do know what causes the oil to leave the fish and enter the water in the barrel?

A. Experience with this commodity.

(Testimony of L. C. Perry.)

Q. What is that experience?

A. Oh, I have inspected some barrels that are good herring and some that are bad. That which is good hasn't the oil on it and that which was bad had the oil on the top of it.

Q. Have you ever definitely ascertained the causes in [208] these prior occasions that you have now referred to which made the oil come to the top?

A. Yes.

Q. Will you please state what causes in your experience have made oil leave the fish and come to the top of the barrel?

Mr. Wakefield: That is objected to, if the Court please. It appears from this witness' testimony that he has inspected some herring—how much he hasn't said—that good herring doesn't have oil and bad herring does.

Now, as to the cause of the oil being there or the cause of the oil coming out, there is no qualification shown at all.

The Court: The objection is overruled.

(Last question repeated by the reporter.)

A. Heating of the fish.

Q. (By Mr. Hamlin): Have you ever observed any other cause which caused the oil to leave the fish and come to the top of the barrel?

Mr. Wakefield: The same objection.

The Court: Overruled.

A. Just heating. [209]

Q. (By Mr. Hamlin): I say, have you ever observed any other cause, other than heat?

(Testimony of L. C. Perry.)

A. No.

Q. Have you computed the value of the shipment of 1358 barrels involved herein, assuming it to have been in good order and condition?

A. I have.

Mr. Wakefield: That is objected to as repetition and the witness not having been shown to be qualified to testify as to value.

Mr. Hamlin: I merely asked him if he has computed.

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: The objection is overruled.

Q. (By Mr. Hamlin): What values did you use in computing such entire value?

Mr. Wakefield: I object to that. I can't see how that is evidence of value, your Honor.

It is not shown that he has ever sold a barrel of herring or knows anything about how much it is worth.

The Court: The objection to the form of the [210] question is sustained with leave to inquire what elements, if any, are concerned in making the computation—what elements of value.

Mr. Hamlin: I might state that the only reason I am doing this is to get in one place a compilation and right straight down the record for the convenience of the court instead of having to total these things up. I have asked him only what figures he had used in arriving at this total value.

The Court: The objection to the form of the

(Testimony of L. C. Perry.)

question last put is sustained and the ruling will stand.

Q. (By Mr. Hamlin): Are you now today familiar with the fair market value of salt herring in good order and condition on September 4th, 1946, ex dock at Seattle, Washington?

A. I am by referring to my records.

The Court: In that connection, the court would be interested to know when the records were made and for what purpose they were made.

Q. (By Mr. Hamlin): You have referred to certain records. I will ask you now when you made such records.

A. Well, it was actually typed on February 3rd.

The Court: What year?

The Witness: 1947.

A. (Continuing): And through my penciled notes in my notebooks; the notes were made at the time of the survey, that I have all the records in the case.

Q. (By Mr. Hamlin): What investigation did you make upon which to base your finding as to such fair market value on the date of that?

A. I inquired of the people who handled this commodity and compared their prices to see if one was the same as the other, and it seems as though there was an established set price at that particular time for different sizes of barrels and quarter barrels.

Q. Of how many different people did you inquire at that time? A. Three.

(Testimony of L. C. Perry.)

Q. Who are they?

A. Mr. Ellis of James Farrell & Company; Mr. Jacobs of Oxenburg Brothers, and Pete Wahl.

Q. What is Oxenburg Brothers?

A. They are dealers in salt fish, also for salt herring.

Mr. Wakefield: May I interrupt and ask Counsel: Are you merely trying to get before the [212] Court what is shown on the Captain's survey report as to the total amount of damage?

Mr. Hamlin: That is right.

Mr. Wakefield: Read it. I will agree to it as being shown on the Survey Report.

Mr. Hamlin: Very well. The computation of value is as follows:

“110 quarter barrels of medium at \$13, \$1,430; 119 half barrels large at \$23, \$2,737; 1129 half barrels medium at \$21, \$23,709; total value of shipment, \$27,876.”

The Court: Do counsel on both sides in the case among themselves know whether or not this survey report is ever going to be offered in evidence or is going to be attempted to be put in evidence or not?

Mr. Hamlin: I do not intend to offer it, your Honor.

The Court: Proceed, then. It seems like the time we have taken up in getting this bit of information out of this witness has been unduly lengthy, to the court.

Q. (By Mr. Hamlin): Do you know how much was received [213] from the sale of this shipment?

(Testimony of L. C. Perry.)

A. Yes.

Q. How much was it?

A. The total received from the sales was \$10,-
329.

Q. Did you have any personal connection with the charges—the authorization of charges which were incurred by this shipment in inspection, repair, culling, segregation and storage?

A. Yes.

Q. Did you discuss such charges with Mr. Gow?

A. I believe we did.

Q. Before they were incurred?

A. No, I wouldn't say before they were incurred but when they were incurred. We consulted to see if they were fair and reasonable.

Q. Have you tabulated the expenses which were incurred by this shipment after it was landed on September 4th, 1946? A. I have.

The Court: Have you instructed the witness, Counsel, not to include items which yesterday were discovered to be not includable?

Mr. Hamlin: Yes, your Honor. The list which I will ask him to read is, so far as I know, the correct one, your Honor. [214]

Q. (By Mr. Hamlin): Will you state each charge which was incurred by this shipment, the amount and the reason for it, please?

Mr. Wakefield: That is objected to, if the Court please, unless it is further qualified to be charges which the libelant contends were incurred as a result.

(Testimony of L. C. Perry.)

The Court: I assume that counsel inquiring of the witness has to try to avoid leading questions and I believe that the objection should be overruled.

Mr. Wakefield: The part of the question I objected to was that his question assumes that these are the part of the charges attributable to this damage.

The Court: The Court has already cautioned counsel inquiring to use his best good faith to try not to have included those items which yesterday were discovered by counsel inquiring not to be included by him.

Proceed.

A. Peter Wahl inspecting number 3 hold shipment, \$99.00; Peter Wahl inspecting number 4 hold shipment, \$54.00; Port of Seattle bills, extra wharfage and handling to cold storage, 971 half barrels, \$153.59. [215]

Q. (By Mr. Hamlin): Would you read the date of each as you go along?

A. That was 9/4/46. That is September 4th, 1946. Then bill number "B97648, receiving in cold storage September 4th, 1946, \$258.72."

Mr. Wakefield: May I interrupt and object further, your Honor. This is all in evidence. The actual bills have been offered as an exhibit and admitted.

I object to it as repetition. It doesn't add a thing to what is before the court.

The Court: What is the purpose?

(Testimony of L. C. Perry.)

Mr. Wakefield: He is just reading a list of bills and they are all in evidence.

The Court: What is the purpose?

Mr. Hamlin: The purpose is simply to correct in the record an error which was unfortunately injected into the case yesterday.

The Court: Very well. Do so as briefly as possible. Couldn't you get him to state the totals and then, if opposing counsel on cross-examination is interested on the various items—

Q. (By Mr. Hamlin): Would you then please state the total of the expenses which you were working on before [216] the objection was made?

A. The total amount of all expenses connected with this case is \$1706.92.

Mr. Wakefield: I move to strike the last part of the witness' answer—the words “in connection with this case.” That is a conclusion.

The Court: The objection is overruled. You may inquire on cross-examination as to his knowledge of that fact.

Mr. Hamlin: That is all.

Cross Examination

By Mr. Wakefield:

Q. Captain Perry, what time of day was it on the 5th of September, 1946, when you and Mr. Kniseley took the temperatures of the barrels of herring?

A. The barrels of herring? Oh, I would say approximately 2:30 p.m., on the afternoon of September 5th, 1946.

(Testimony of L. C. Perry.)

Q. About how many barrels did you open and examine at that time?

A. Well, there were opened by Pete Wahl a dozen or fifteen barrels, here and there, taken at random. [217]

Q. Did you say that the barrels were opened or that they did open them after you got there?

A. No. We had been opening them. I was there from morning on.

Q. Well, these 12 to 15 barrels that you examined and took the temperatures of, were they opened at that time or had they been previously opened?

A. No. Mr. Kniseley designated certain barrels he would like to have opened in addition to the ones that we had opened.

Q. And the ones that you took the temperature from were barrels that he designated and asked Mr. Wahl to open, is that correct?

A. That is correct.

Q. What type of barrels did he pick out; was there any particular type of barrel?

A. You mean as to size?

Q. No; as to condition?

A. Well, I don't know what prompted his judgment or why he selected certain barrels but he would say, "Well, open this one," and "Open that one."

Q. And as far as you recall, they all looked the same on the outside?

A. Yes; they were the same more or less.

(Testimony of L. C. Perry.)

Q. Was it after you took the temperature of the barrels [218] that you went down into the hold of the vessel? A. That is correct.

Q. Was the strike on at that time?

A. Yes, it was.

Q. Who was aboard the ship, if anyone?

A. There was a watchman.

Q. None of the crew were aboard?

A. No, sir.

Q. All of the lights were off, were they?

A. As I recall it, yes.

Q. I mean you had to use flashlights to go down in the hold? A. That is right.

Q. How was the temperature taken down in the hold? A. By a thermometer.

Q. And from what spot or location?

A. Oh, I imagine it was about the center of everything where we thought the cargo had been stowed as to height. We knew it was between the alleys but we didn't know just how high it went, so we tried to strike on the center of the lot.

Q. Did he hold the thermometer up in the air or down to the ground?

A. Just held it out.

Q. He just held it up in front of him? [219]

A. Yes.

Q. Did you examine number 4 hold when the herring came out on the 25th or 26th of September?

A. Yes, I examined it.

Q. Did you take temperatures?

A. No, sir.

(Testimony of L. C. Perry.)

Q. Did you take the temperature of any of the herring that was discharged from number 4 lower hold on September 25th? A. I did not, no.

Q. Did anybody else take any temperature?

A. Not to my knowledge.

Q. Why was that; if you were inspecting this fish, number 4 lower hold, and took temperatures on the 5th in respect to number 3, why didn't you take the temperatures on the 25th?

A. Well, in my mind it wouldn't tell you much because the fish had laid in number 4 hold for some twenty odd days more. It wouldn't give you a true picture of anything except what the temperature of the fish was then.

Q. But you thought that such a temperature wouldn't be of any value for purposes of suit or otherwise?

A. We had found the fish in number 3 was damaged. When we opened the kegs that came out of number 4, we found [220] them damaged also. And such a time had elapsed, that, to my mind, it didn't serve any useful purpose.

Q. These charges, Captain Perry, did you approve all of those charges in your capacity as a surveyor? A. I did.

Q. I understand you to say that they are all attributable to the handling of this fish after it was removed from the ship? A. Yes.

Q. What charges would the owner of the fish normally have if it had been sound fish and he had had to discharge it from the ship and handle it?

(Testimony of L. C. Perry.)

A. Well, that would depend entirely upon his sales, I presume. I don't think I could answer that question.

Q. In other words, these charges totaling \$1706.92 are all of the charges that were incurred after the fish left the ship except for that one item that was stricken out yesterday?

A. I don't know. The only think I can say is that these charges that I have approved are those charges that relate to the cargo and were necessary on account of it being in its damaged condition. If there were any other charges, I don't know anything about them.

Q. Well, you have wharfage and handling on sound fish, [221] don't you, Captain Perry?

A. I beg your pardon?

Q. I say you have wharfage and handling charges on sound fish, don't you?

A. Sometimes, yes.

Q. And you have storage charges on sound fish, do you not?

A. If it is going into storage, correct.

Q. You have inspection charges on sound fish, do you not?

A. Well, you don't have the exhaustive inspection that you had here.

Q. I know. But all herring is inspected when it arrives here regardless of damage?

A. Well, presumably.

The Court: How would the item here charged for inspection compare with the ordinary inspec-

(Testimony of L. C. Perry.)

tion charge?

The Witness: I believe this charge is higher in view of the fact that we found the damage and therefore we had to go into every keg. Where, if you take kegs at random and find no damage, then your inspection is held to a minimum and your charge is a minimum charge.

The Court: Are you familiar with those minimum charges? [222]

The Witness: I am not, sir.

The Court: Proceed.

Mr. Wakefield: That is all, Captain.

The Court: You may be excused, Captain.

(Witness excused.)

The Court: Call the libelant's next witness.

Mr. Hamlin: The libelant rests, your Honor.

The Court: The libelant rests. The respondent may now proceed.

TESTIMONY ON BEHALF OF RESPONDENT

Mr. Wakefield: If the Court please, at this time the libelant having rested its case, the respondent, United States, challenges the sufficiency of the evidence and moves for a dismissal of the libel on the ground that the evidence has failed to prove any negligence or fault of the respondent or of the vessel resulting in damage.

The libelant having proceeded with its case to prove the condition of the fish and an attempt to prove the cause of damage has failed to introduce any evidence showing that the heat— [223] or that

heat resulted from the ship during the time the herring was aboard the ship and in transit from the point of loading to the point of discharge. And there being no evidence to render the respondent liable on the basis of negligence or improper stowage or unseaworthiness or any other ground, we submit to the court that libelant has failed to sustain the burden of proof and that the libel should now be dismissed.

The Court: The court is ready to rule upon that. The challenge is overruled and the motion is denied.

The respondent may further proceed.

OPENING STATEMENT ON BEHALF OF RESPONDENT

Mr. Wakefield: If the Court please, the position of the respondent in this case is that no damage resulted to this herring because of any negligence or fault of the respondent or the vessel or of its officers or crew and that the cargo was loaded, stowed and carried in the regular, ordinary manner and out-turned in an unfit condition due to either inherent vice of the commodity, it having been insufficiently cured, or having been exposed [224] to the sun at the cannery or kept too long at the cannery or any number of causes which have already appeared in the evidence and many which will appear in the respondent's case.

The respondent's evidence will show that this shipment consisting of 1358 barrels was loaded

aboard the Denali on Voyage 55 of that vessel at Port Wakefield, Alaska, on August 23rd, 1946. Nine hundred seventy-one barrels were placed in number 3 lower hold in the center of the hold between the shaft alleys and three hundred eighty-seven barrels were placed in number 4 lower hold in the same location, namely, between the shaft alleys and the center of the hold.

I might say that the shaft alleys spoken of frequently refer to twin screws. The Denali is a twin screw vessel having shaft alleys from the engine room to the propeller at the stern. These shaft alleys are humps in the hold, covered with steel bulkheads, the same as any other steel bulkhead, and inside of the shaft alleys is the propeller shaft. So when we say "between the shaft alleys," we have reference to that area of the lower hold which is situated between these two steel coverings that extend over the propeller shafts. [225]

At the time of loading it at Port Wakefield, Mr. Wakefield—who has testified as a witness—was present and knew the cargo was going into number 3 and number 4 holds. He had made his previous shipment not more than thirty days prior to this one in question from Port Wakefield, which was carried in number 3 lower hold and consisted of over nine hundred barrels of salt herring. No refrigeration or cool room storage is requested nor does the contract between the parties call for anything other than ordinary stowage, and that has been admitted by the libelant in answer to interrogatories.

There is no issue in this case as to cold storage or cool-room storage. We have here nothing more than ordinary stowage.

After the vessel had loaded at Port Wakefield, it proceeded to Port Vita which is right close by—a matter of one-half hour's traveling, a very few miles, where a quantity of barrels of herring were loaded in number 1 lower hold.

At the time the Denali came up to the Port Wakefield dock the purser — who will testify — observed that the barrels of herring were stowed out on the face of the dock. He estimated about four hundred—that they were uncovered, that they [226] were dry and that they were warm. He touched them with his hands and will testify that these barrels of herring were dry and were warm and were not covered with anything whatsoever nor had they been wetted by water or anything else.

The balance of the shipment, as has been admitted, was stowed just inside the door of the plant on the face of the dock adjacent to where these barrels were sitting out in the bright sun.

The Port Vita shipment, the evidence will show, was covered and wet—was being wetted—and the barrels were wet at the time the vessel came along and when they were loaded.

The Port Vita shipment in number 1 lower hold was discharged on September 25th or 26th, after the strike, and out-turned without any damage.

After the vessel left Port Vita it proceeded to several other canneries, and number 3 hold was entered and loaded into as late as August 26th,

I believe, at which time the Chief Officer was down there climbing around over the shaft alleys and in the hold and he testifies that the hold was normal and cool.

Number 4 hold was entered as late as August 26th, at another cannery where fish was entered into [226-a] number 4 hold and the same thing was true, that the hold was normal and cool at that time. The vessel arrived at Seattle on September 3 about 6:00 p.m., and discharged passengers, baggage and mail and express.

On September 4th, the following day, the vessel proceeded to the Bell Street Terminal where the nine hundred seventy-one barrels of herring in number 3 hold were discharged, that being completed shortly after midnight on the 4th.

The general strike of sailors, longshoremen and others started early on the morning of the 5th and the Denali, along with other ships, was shut down.

The evidence will show what the shutting down process is, and this was completed at 10:30 p.m., on the morning of the 5th, at which time the Denali was completely shut down, closed up tight, the fans off and everything secured for the strike.

The strike continued until the 25th at which time there was a break for five days, namely, from the 25th to October 1st there was no strike. That was the only 5-day perior or the only period from about May until December that there was not some kind of a strike. And the balance of the herring [227]

in number 4 lower hold was discharged on that date, when the strike terminated.

The evidence will show that number 3 and number 4 lower holds of the Denali are regular, usual and customary holds, that they are not hot holds, or warm holds. The evidence will show that herring shipments are and have been frequently carried in these holds, that it is a regular, proper and customary place to carry herring.

In addition the evidence will show that on north-bound trips from Seattle to Seward, perishable cargoes are stowed in number 3 and number 4 holds—citrus fruits, eggs, candy, lard, apples, tomatoes and commodities of that kind are successfully carried in number 3 and number 4 holds.

The evidence will also show that nothing occurred on this voyage which was out of the ordinary and which accounted for any heat in either hold. There was no accident.

There was no change in conditions, no act of any kind which would account for anything other than the ordinary conditions to be encountered.

The respondent therefore will prove by its evidence that this herring was afforded the ordinary stowage which had been given to herring on [228] many similar voyages and that nothing occurred aboard the ship to account for any heat or unusual conditions on this particular voyage.

In addition there will be evidence of persons qualified to testify which in my opinion casts considerable doubt upon the sufficiency of this cargo at the time it was loaded to be successfully carried

and also whether or not it might not have been in a damaged or bad condition at the time it was actually loaded aboard the ship.

I would like to begin by offering in evidence certain of the interrogatories—answers to interrogatories propounded by the respondent to the libellant.

In that connection I would like first to offer Interrogatory Number 7. Interrogatory Number 7 reads as follows:

“If barrels were kept or stored in a warehouse or covered space before loading, state how many were so stored and for how long and what care or protection was afforded the barrels during that time?

“Answer: All of the half barrels mentioned in the Libel were stored in Libellant’s plant [229] under cover until two or three days before the Denali arrived on August 23rd, 1946 at which time something less than 400 of such half-barrels were removed to the open dock. Such half barrels were stored for varying lengths of time. In general, the number packed on each day as stated in Libellant’s Answer to Interrogatory Number 1 less the twenty per cent shrinkage were placed in said storage approximately ten days after processing was started. No particular care or protection was given or required by these barrels in covered storage as the weather was cool and conditions in all respects normal.”

In that connection, the respondent desires to note for the record and call to the attention of the

Court the fact that Mr. Wakefield has already testified by way of amendment to this answer that the barrels on the dock were there five or six days before the ship arrived whereas this answer states two or three days.

Respondent next would like to offer in evidence Interrogatory Number 13 and the Answer. The interrogatory is as follows: [230]

“Question: In connection with packing or processing salt herring, state how long the completed product is supposed to remain sound after being packed and under what specific conditions?

“Answer: Under cool-room storage a barrel of salt herring will remain in good condition indefinitely. At ordinary room temperatures of around 70 degrees, libelant does not believe it would remain sound for longer than one week.”

Next, respondent would like to offer Interrogatory Number 14 reading as follows:

“Question: Does the shipment of salt herring from Alaska to Seattle require cold storage or cool-room storage or is it desirable or requested?

“Answer: The shipment of salt herring from Alaska to Seattle does not require cold storage or cool-room storage nor is it desired or requested by libelant. Any ordinary cool hold of the ship not containing steam pipes or bulkheads adjoining the engine [231] room or containing steam pipes has been found satisfactory in Libelant’s experience.”

I would like next to offer in evidence Interrogatory Number 16 reading as follows:

“Question: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage?

“Answer: Libelant believes that the subjection of salt herring in barrels to heat up **70 degrees** for one week would damage it and render it unfit for food.”

I would next like to offer in evidence Interrogatory Number 17, reading as follows:

“Question: State the maximum daily temperatures at Port Wakefield, Alaska, between August 1, 1946 and August 24, 1946 and state whether on each day it was clear, cloudy or [232] rainy?

“Answer: Libelant kept no record and cannot answer Interrogatory Number 17, except that the weather was the same as usually encountered at Port Wakefield during the season in question. At the request of libelant the United States Department of Commerce, Weather Bureau, has furnished a statement of weather conditions at Kodiak, Alaska, the nearest point where weather observations are made at Port Wakefield, Alaska. Copies of this document and the explanatory letter of the Weather Bureau are attached hereto and incorporated in this answer by reference.”

I believe the letter and Weather Bureau record should be put in evidence. I will ask counsel if he has the original of that or one loose copy so I won't have to take my file apart?

Mr. Hamlin: I have it here. (Document handed to Mr. Wakefield by Mr. Hamlin.)

Mr. Wakefield: I ask that this be marked as an exhibit.

If the Court please, I have a deposition [233] which I wish to read next and in that deposition are exhibits marked A-1 to A-5, inclusive. I am wondering if this exhibit which I am now referring to might not be marked A-6?

The Court: Have you any others to be appropriately marked, in your opinion, smaller in identifying number?

Mr. Wakefield: The deposition has exhibits "A" to "A-5", inclusive, attached to it which will be offered.

The Court: This exhibit has not been previously referred to by any other number in the deposition or otherwise?

Mr. Wakefield: No, this one has not.

The Court: The Exhibit Number A-6 will be assigned to this particular exhibit.

(Letter and meterological data marked Respondent's Exhibit A-6 for identification.)

Mr. Wakefield: I offer Respondent's Exhibit A-6 in evidence, if the Court please.

Mr. Hamlin: No objection.

The Court: Admitted.

(Respondent's Exhibit A-6 received in evidence.) [234]

Mr. Wakefield: I would like to now request the publication of the deposition of Arney Burns, a witness for respondent.

The Court: Is there any objection?

Mr. Hamlin: No objection.

The Court: Are there any other depositions to be published and read besides this one?

Mr. Wakefield: That is the only deposition, your Honor.

The Court: What is the name of the witness?

Mr. Wakefield: Arney Burns, Chief Officer of the Denali.

If the Court please, the original does not seem to be on file. I have a signed copy and Mr. Hamlin has a signed copy. I don't know what happened to the original.

The Court: I believe that the Court is going to have to make some ruling for future cases which Counsel in similar situations may not entirely approve of. But it seems that the result of counsel's work in some of these cases is becoming less accurate and more careless all of the time.

This is obviously an oversight by counsel in the case. I do not like for counsel to feel that they can keep on perpetuating such negligent practices.

In the future I ask you kindly to take such measures as will insure against a result of this sort.

Proceed. Is there any objection to reading the deposition?

Mr. Hamlin: None, your Honor.

The Court: What copy is it that is going to be offered or used as an official copy for filing?

Mr. Wakefield: I would like to offer the copy I have which is a duplicate original, signed by the Notary.

The Court: I now have in my hands a copy of this deposition. When counsel are ready, they may proceed.

Mr. Wakefield: Under the circumstances, I wonder if the court would object to Counsel using that copy of the deposition?

The Court: Everyone except the trial judge will now use copies of the deposition.

Mr. Wakefield: I am very sorry about that, your Honor. I thought the original was filed.

The Court: Of course, you should have seen about that before the case was started.

Mr. Wakefield: I will ask that Mr. Crutcher take the stand and read the answers while I read the [236] questions.

(Whereupon, Mr. Wakefield, Counsel for the Respondent, read the questions of the deposition of Mr. Burns, and Mr. Crutcher, Counsel for the Respondent, read the answers of the deposition referred to as follows:)

ARNEY BURNS,

called as a witness on behalf of Respondent, having been first duly cautioned and sworn, testified by deposition DeBene Esse as follows:

Direct Examination

By Mr. Wakefield:

“Q. Will you state your name, please?

“A. Arney Burns.

(Deposition of Arney Burns.)

“Q. What is your occupation?

“A. At the present time, chief officer.

“Q. On what ship? “A. The Reef Knot.

“Q. Mr. Burns, are you about to leave on a voyage [237] of the Reef Knot for some time?

“A. Yes, sir.

“Q. Where are you going?

“A. Nome, Alaska.

“Q. When are you leaving Seattle?

“A. Tomorrow, June 16, 1948.

“Q. How long will you be away on this voyage to Nome? “A. About two months.

“Q. Were you chief officer on the Denali in August and September of 1946, on Voyage Number 55? “A. Yes.

“Q. On the voyage, which I will refer to as Voyage Number 55, did you stop and take on some barrels of herring at Port Wakefield, Alaska?

“A. Yes.

“Q. As Chief Officer of the Denali, what were your duties, generally, with respect to the loading of cargo?

“A. First of all, to see that the holds were all clean, and in good condition to receive cargo. Just supervising the loading or discharging, and seeing that the cargo has [238] proper stowage and proper handling, and no damage—to get no damage when you are loading and discharging.

“Q. On this occasion, on Voyage Number 55, when did the Denali arrive at Port Wakefield?

“A. May I look at the record?

(Deposition of Arney Burns.)

“Q. Yes. I will hand you the log book, which I will ask to have marked as Respondent’s Exhibit A-1—

“(Log book marked for identification Respondent’s Exhibit A-1.)

—and ask you if this is the original log book of the Denali for Voyage Number 55? “A. Yes.

“Q. By referring to the log book will you tell us when the Denali arrived at Port Wakefield?

“A. We arrived in Port Wakefield August 23rd, at 11:55 a.m.

“Q. By what time had you completed loading and sailed from Port Wakefield?

“A. 8:12 a.m., on August 24, we left Port Wakefield.

“Q. The entry is in that log book, Mr. Burns, I note run for twenty-four hours, do they?

“A. Yes. [239]

“Q. I was just looking at that, and the times beyond 12:00 noon, are shown as 13, 14, 15, etc.?

“A. Yes.

“Q. This is 11:58. Is that p.m., or a.m.?

“A. That is apparently a.m.; 11:58 a.m., arriving:

“Q. I say, do the entries run up to 2400?

“A. Yes.

“Q. At the time the Denali arrived at Port Wakefield, what if anything can you tell us about the barrels of herring, and where they were stored at the cannery or saltery?

(Deposition of Arney Burns.)

“A. Part of the shipment was stowed outside, on the dock; and the other part, or part of it, was stowed inside, in the warehouse.

“Q. Is this a small dock or a large dock?

“A. A small dock.

“Q. Where was the part of the shipment that was stowed out on the dock, with reference to where the ship landed?

“A. Well, it was stowed either abreast of number 3 and number 4 ahead there. That is about the length of the dock. In the first place, on that short dock, the barrels were near the face of the dock. Very near. About outside, 10, approximately. [240]

“Q. Ten feet from where the ship landed?

“A. Approximately.

“Q. This warehouse that you speak of, where is that located with respect to the place where the barrels that were out on the dock were?

“A. Well, it was directly behind, to a certain extent—directly behind the dock there. There is a door leading in there from the dock, and a big door there, and inside there is a warehouse.

“Q. How far back from the face of the dock, approximately, would you say the warehouse begins?

“A. It is pretty hard to say. About thirty feet, probably.

“Q. These barrels of herring which were stored outside, on the face of the dock, as you have just testified, what did you observe as to the condition

(Deposition of Arney Burns.)

of those barrels, as to whether they were covered or uncovered, or wet or dry, or what not?

“A. They were uncovered, and dry.

“Q. Do you recall anything as to the condition of the barrels that were inside of the warehouse, as to whether they were covered or [241] uncovered, or wet or dry?

“A. I do not remember that.

“Q. Mr. Burns, have you had considerable experience on ships in Alaska, particularly with respect to loading barrels of herring? I say, have you had considerable experience in Alaska, on board ships, particularly with reference to loading barrels of herring?

“A. Yes. We do that more or less every trip on the summer voyages.

“Q. How long have you been an officer on Alaska boats? “A. Seven years.

“Q. Has it been customary in your experience to bring barrels of herring from Alaska to Seattle? “A. Yes.

“Q. What has been your experience, Mr. Burns, in loading barrels of herring on other occasions, as to the condition of the barrels, as to whether they are covered or uncovered, or wet or dry?

“A. As a rule they usually are uncovered, at most of the places. At some places they have like what we call an overhang, an overhang like [242] a bridge, and at Port Vita they have sufficient overhang there, and they usually keep it under cover there. I assume that is to protect it from the weather.

(Deposition of Arney Burns.)

“Q. What can you say with respect to whether the barrels as you have observed them at these other places are wet or dry, or what condition they were in?

“A. Naturally, they would not be wet if it is not raining. If it is dry weather they would naturally be dry, also.

“Q. Did you have occasion on this particular instance of loading herring at Port Wakefield to look at these barrels, or touch them or feel them, and can you tell us whether or not they were warm or cold, or what their condition was?

“A. Personally not.

“Q. What was the general condition of the weather at that time, if you remember?

“A. At that particular time the weather was unusually warm for Alaska. That is, it was warm weather.

“Q. How about the weather generally, as you recall it, on that voyage, not only at Port Wakefield, but three or four or five or six days each [243] way from there? If you recall.

“A. Well, previous to arriving at Port Wakefield we came from Seward. I might have to refer to the log book. I do not quite recall that.

“Q. You can refer to the log book if you do not recall.

“A. (Witness refers to log book). From August 19th, up to arriving at Port Wakefield, the temperature ran all the way from 56 up to 63. Various temperatures.

(Deposition of Arney Burns.)

“Q. In your experience is that average, or would that be warm weather for Alaska at that time of the year?

“A. Well, I would consider it warmer than average.

“Q. How about the balance of the ship, Mr. Burns, from Port Wakefield, down to Seattle? What do you recall as to the weather, or what does the log book show?

“A. According to the log book the temperature was somewhat less than that after leaving Port Wakefield. The temperature was somewhat less, according to the log book.

“Q. You do not show daily temperatures, or temperatures on each watch, in the log book, do you?

“A. I note that in some places they have, and other [244] times they have not, but as a rule there is for each one.

“Q. And those temperatures are recorded under the heading ‘temperature’? A. Yes, sir.

“Mr. Wakefield: I will ask that this group of four papers, entitled ‘Hatch List,’ be marked as Respondent’s Exhibit A-2.

“(Four papers marker ‘Hatch List,’ marked for identification, Respondent’s Exhibit A-2.)

“Q. Mr. Burns, handing you this group of four papers, fastened together, and marked Respondent’s Exhibit A-2, and each being headed ‘Hatch List,’ will you state what they are?

(Deposition of Arney Burns.)

“A. This shows the correct stowage of every cargo loaded into the ship.

“Q. Did you prepare those documents yourself?

“A. I prepared them and gave them to the purser.

“Q. Have you signed each one of those four papers? A. Yes.

“Q. Do you identify those signatures as your own, ‘A. E. Burns’? A. That is correct. [245]

“Q. Referring to Respondent’s Exhibit A-2, will you tell us where the herring loaded at Port Wakefield was stowed aboard the Denali, on Voyage 55, on August 27, 1946?

“A. In Number 3 lower hold. The center of the lower hold, it should be.

“Q. How many barrels?

“A. 971 half-barrels.

“Q. 971 half-barrels in Number 3 lower hold, center? A. Yes.

“Q. And where else?

“A. The center of Number 4 lower hold.

“Q. What was stowed there?

“A. 387 barrels.

“Q. Can you tell where they were stowed in Number 3; first, with reference to the shaft alleys in Number 3 lower hold? A. Yes.

“Q. Where were they stowed with reference to the shaft alleys in Number 3 lower hold?

“A. They were stowed between the two shaft alleys.

(Deposition of Arney Burns.)

“Q. What are those shaft alleys, Mr. Burns?

“A. That is the housing for the shaft, the propeller shaft. [246]

“Q. What is this housing, so-called, made of? What kind of a housing is it?

“A. It is more or less a half round steel housing.

“Q. And the Number 3 lower hold space between the shaft alleys is a space on the floor of Number 3 lower hold which is situated between those two housings, is that correct? A. Yes.

“Q. How were those 971 barrels stowed in Number 3 lower hold?

“A. First, there was light dunnage down in the bottom, on the deck. Then the barrels were on end, one tier complete.

“Q. A full tier all over the hold?

“A. Yes. Then there was dunnage, another layer of dunnage on top, then another tier completely full, and so on.

“Mr. Wakefield: I will ask that this document entitled ‘Cargo Stowage Plan’ be marked as Respondent’s Exhibit A-3.

“(Cargo Stowage Plan marked for identification as Respondent’s Exhibit A-3.)

“Q. Mr. Burns, handing you this document entitled ‘Cargo Stowage Plan,’ which has been marked [247] Respondent’s Exhibit A-3, will you tell us what it is?

“A. That is the cargo plan that shows different lots of cargo loaded into the ship.

(Deposition of Arney Burns.)

“Q. Did you prepare this stowage plan?

“A. Yes.

“Q. Does it show the stowage location of the 972 barrels in Number 3 hold, at Port Wakefield?

“A. Yes.

“Q. And does it also show the other two lots of herring loaded at Port Wakefield in Number 4 lower hold? A. Yes.

“Q. Just so we can understand it, will you indicate on that exhibit with a pen—I note there being no other pen marks on the exhibit—just mark with a pen the section of Number 3 lower hold where the herring was stowed between the shaft alleys? A. Shall I mark it ‘X’?

“Q. Just outline it, the section of Number 3 lower hold between the shaft alleys where these 371 barrels were stowed.

“A. Yes. (Witness indicates on exhibit.)

“Q. And also, in Number 4 lower hold, mark the [248] space where the lots of 110 quarter barrels and 277 half-barrels were stowed, from Port Wakefield?

“A. Yes. (Witness indicates on Exhibit A-3.)

“Q. Those two outlines that you have drawn on Respondent’s Exhibit A-3, in Number 3 and Number 4 lower holds, represent the spaces where the Port Wakefield shipment was stowed on the Denali, on Voyage 55? A. That is correct.

“Mr. Wakefield: I will ask that this blueprint drawing entitled ‘Hold. SS Denali’ be marked as Respondent’s Exhibit A-4.

(Deposition of Arney Burns.)

“(Blueprint drawing marked for identification as Respondent’s Exhibit A-4.)

“Q. Mr. Burns, handing you what has been marked Respondent’s Exhibit A-4, I will ask you if that is, in your opinion, a correct outline drawing of the Denali, showing the lower hold?

“A. Yes, it is.

“Q. First, with respect to Number 3 lower hold, will you take a red pencil and just indicate the space there that represents the shaft alleys. I would suggest that you mark several cross [259] marks showing the shaft alley space.

“A. Yes. (Witness indicates on Exhibit A-4.)

“Q. The spaces that you have marked with zig-zag red lines in Number 3 and Number 4 lower holds represent the shaft alley space, is that correct?

A. That is correct.

“Q. Mr. Burns, the space between those two shaft alleys, in both Number 3 and Number 4 lower holds, represents the space, does it, where the barrels of herring loaded at Port Wakefield were stowed?

A. Yes.

“Q. Referring again to Respondent’s Exhibit A-4, and the forward end of the Number 3 hold, there appears to be a space between the forward end of Number 3 and the space marked ‘Engine Room.’ Will you tell us what that space is? Do you understand what I mean?

“A. Yes. That appears to be an alleyway.

“Q. On the drawing it appears to connect the two shaft alleys; is that what it is? I have reference

(Deposition of Arney Burns.)

to the space between 'E' and 'E,' as shown on Respondent's Exhibit Number 4?

"A. Yes. (Witness examines Respondent's [250] Exhibit Number A-4.)

"Q. Let us put it this way; is there any alleyway between the two shaft alleys, forward of Number 3?

"A. I do not recollect if there is or not. It is a long time, and I do not remember.

"Q. What would the drawing indicate?"

Mr. Hamlin: That is objected to because it is not shown that the witness is qualified to draw a conclusion from the drawing.

(Argument on objection by respective counsel.)

The Court: The objection is overruled.

"A. The drawing indicates an alleyway.

"Q. The drawing indicates an alleyway. Between the two shaft alleys? A. Yes.

"Q. In connection with handling cargo aboard vessels generally, and the Denali in particular, are you frequently in and out of the holds?

"A. Yes; during cargo operation. [251]

"Q. You are familiar with the insides and the characteristics of the holds? A. Yes.

"Q. On the Denali, on Voyage 55, state whether or not there were any steam pipes in either Number 3 or Number 4 lower holds?

"A. Not to my knowledge.

"Q. How are the winches on the Denali run?

"A. By electricity.

(Deposition of Arney Burns.)

“Q. How is the steering engine of the Denali operated?

“A. As I recollect, it is hydraulic,—operated by hydraulic.

“Q. Mr. Burns, at the time you loaded the barrels of herring in Number 3 and Number 4 lower holds, at Port Wakefield, on August 27, 1946, what can you tell us as to the condition of those two holds?

“A. Their condition was good. They were dry and clean.

“Q. At that same time referred to in the last question, namely, the time of loading this herring, what can you tell us as to the general condition of the vessel, with respect to it being in proper order and condition, or [252] otherwise?

“A. Good.

“Q. As far as you know, was everything in proper working order?

“A. As far as I know, that is right.

“Q. Was there anything at all wrong with the vessel that you know of?

“A. Not that I remember, no.

“Q. Was the loading of herring on this occasion, on August 27, 1946, at Port Wakefield, carried out as usual, or was there anything wrong or different on this occasion?

“A. It was a normal operation all the way through.

“Q. Mr. Burns, tell us about Number 3 and

(Deposition of Arney Burns.)

Number 4 lower holds, as to whether that whole space is above or below the waterline of the vessel?

“A. Part of the lower hold would be below the water line.

“Q. Does the fact that the hold space, or part of it, is below the water line, in your opinion, have anything to do with whether or not the hold is cool, or kept cool, by reason of that fact?

“A. I believe it would have some effect, yes. [253]

“Q. Is there anything you can think of, Mr. Burns, either on the particular voyage in question, Number 55, from Port Wakefield to Seattle, August 27th to September 4th, or generally on the Denali on any other voyage, which would make either Number 3 or Number 4 lower holds hot?

“A. Will you please repeat that?

“(Question repeated.)

I have never had any experience to that effect since I have been on the vessel.”

Mr. Wakefield: Mr. Hamlin makes an objection.

The objection stated by Mr. Hamlin is as follows:

“I do not think the answer is responsive to the question, and I would like to object to it.”

I state as follows:

“Q. The objection is made that your answer is not responsive, and the question was, is there anything you can think of that happened, or any condition, that would make this a hot hold, or make these two holds hot [254] holds? A. No.

(Deposition of Arney Burns.)

“Q. Is either Number 3 or Number 4 lower hold considered to be a warm hold on the Denali?

“A. No.

“Q. Had you ever carried barrels of herring in Number 3 and Number 4 lower holds on other voyages? A. Yes.”

Mr. Hamlin: There is an objection to that question on several grounds. It opens up a field of inquiry which I take it is not open to the respondent in this action.

As I understand it, the respondent may rebut any of the evidence which has been introduced by the libelant on its case in chief and further it may show that the vessel was seaworthy or that the damage occurred under one of the causes under the carriage at sea act.

This is in attempt to show that on other occasions cargoes came through all right. I submit that that is not relevant to this inquiry and that it is a field not open to the respondent under any theory of its defense. [255]

Mr. Wakefield: If the Court please, this is highly material because the libelant having shown testimony which in his opinion established or tended to establish the good condition of the commodity, and then having shown it to be damaged upon discharge, contends that that damage was the fault of the respondent or the vessel.

(Argument.)

The Court: The objection is sustained.

Mr. Wakefield: If the Court please, I don't want to labor the court——

(Deposition of Arney Burns.)

The Court: The ruling will stand.

You may proceed.

Mr. Wakefield: Do you mean——

The Court: The question asked and the objection to it is now what is before the Court and that objection is sustained.

Mr. Wakefield: May I ask the reporter to read what the objection was and the grounds?

(Last objection by Mr. Hamlin repeated by the reporter.)

The Court: The ruling will stand. You may continue with the reading of the deposition. [256]

“Q. Would you say it was customary to carry barrels of herring in Number 3 and Number 4 lower holds on the Denali?

Mr. Hamlin: The same objection is addressed to that question as to the former one.

Mr. Crutcher: If I may interject my comment here. I believe I answered the former question.

The Court: You had better find out what the record shows as to what was objected to. As I understood, it was the first one. It was the question of what he had done previous.

Mr. Wakefield: To clear up the record, I will admit that the objection was to the question on Line 6 reading,

“Had you ever carried barrels of herring in number 3 and number 4 lower holds on other voyages?”

and that the Court sustained the objection to that question, to which I excepted.

(Deposition of Arney Burns.)

The Court: The ruling will stand. And here we have another objection, is that right?

Mr. Hamlin: Yes, Your Honor. I [257] interpose the same objection as made to the other,—it is granted on materiality, as I stated before.

Mr. Wakefield: If the Court please, in connection with this question the following portion of the deposition indicates that I have an exhibit marked A-5 for Voyage 54 immediately preceding the voyage in question on which Voyage 924 half-barrels of salt herring from Port Wakefield were loaded in Number 3 lower hold, center, the identical place where the herring on this voyage was loaded.

I think that is highly immaterial because it shows that this same shipper shipped the same commodity in the same space a matter of a month before this, without any damage or claim.

The Court: I would like to have brought before the court again what it is you are objecting to, Mr. Hamlin.

Mr. Hamlin: Counsel read a question as follows, Your Honor:

“Would you say it is customary to carry barrels of herring in number 3 and number 4 lower holds on the Denali?”

I then objected to that question upon the same grounds that I had stated in objecting to the question [258] immediately before it, namely, that it is not competent for the respondent to show that at some former time cargoes were carried in this hold without damage. The carriage of goods by

(Deposition of Arney Burns.)

Sea Act casts a burden upon the respondent to show that when cargo was damaged, it was through some one of the causes excepted under such act, or accepted under the terms of the bill of lading, before the respondent can escape liability.

Mr. Wakefield: That is a mis-statement of the law, Your Honor, and I don't want to be understood as agreeing to that in any sense of the word. That is not the law.

The Court: What is the rule respecting preserving objections to questions? What is waived by failing to state an objection, if anything is waived by such a failure, according to your contention, Mr. Wakefield?

Is there anything waived by failing to state an objection, or in what respect is there a waiver by failure to object?

Mr. Wakefield: Do you mean at the time the deposition was taken?

The Court: Yes, that is what I mean.

Mr. Wakefield: Well, this deposition on page 2 [259] stipulates that all objections are reserved until the deposition is offered in evidence at the time of the trial of this cause, except objections as to the form of the questions or the answers thereto not being responsive, which objections shall be made and taken after this time.

The Court: Where are you reading from?

Mr. Wakefield: On page two, Your Honor.

The Court: Page two, the second paragraph of Mr. Wakefield's statement?

(Deposition of Arney Burns.)

Mr. Wakefield: Yes, it starts on line seventeen.

The Court: I think the court should make the same ruling here as was made in regard to the other objection.

Mr. Wakefield: I would like to have this exhibit marked as Respondent's Exhibit A-5, which is entitled "Hatch List."

The Court: It is so marked.

If counsel between now and tomorrow morning would furnish to the court the decision of an Appellate Court, regarded by counsel as controlling on this Court's action upon a question [260] of this sort, I say to counsel the same authority will be welcomed by this Court to see, by any chance, if the Court can be in error.

Mr. Wakefield: If the Court please, I don't understand the basis of the objection, or the basis of the ruling. I can't see that there is any question about it. This goes to the question of proper stowage. The exhibit Your Honor now has shows a shipment by this same libelant a month before. You can't prove proper stowage other than by what has been carried there.

The Court: It might properly be stated in response to Mr. Wakefield's last remark, that obviously counsel present cannot cross-examine as to this previous stowage, and cannot know what the conditions as to the previous stowage were, whereas each is supposed to have investigated and learned and have been advised concerning the conditions affecting stowage in the case here in dispute.

(Deposition of Arney Burns.)

Mr. Wakefield: Counsel for the libelant has cross-examined this witness at length on the stowage on the previous voyages, Your Honor.

The Court: He may have cross-examined as far as he could at that time. Maybe you might find that would hold that his doing so waived his right to [261] object to it. I don't know.

As I say, you are advised that if you can present to the Court by tomorrow morning an Appellate Court Decision controlling this Court's action on this question, Mr. Wakefield, I would be very glad to reconsider the Court's ruling just announced.

Mr. Wakefield: May I proceed with the deposition?

The Court: Until another objection is made, yes.

(Document entitled "Hatch List" marked for identification as Respondent's Exhibit A-5.)

"Q. (By Mr. Wakefield): Mr. Burns, handing you what has been marked Respondent's Exhibit A-5 entitled 'Hatch List,' for Voyage No. 54, will you tell us what that is?

"A. That is the correct stowage of cargo loaded into the ship.

"Q. In which hatch? A. No. 3 hatch.

"Q. Does that bear your signature 'A. E. Burns'?

A. Yes.

"Q. What voyage does that cover?

"A. Voyage No. 54. [262]

"Q. What date was that voyage, with respect to Voyage No. 55? I mean, was it immediately before it?

A. The previous voyage.

(Deposition of Arney Burns.)

“Q. The date shown on the exhibit is July 28, 1946, what date does that represent?

“A. The date that this cargo was loaded.

“Q. Referring to what has been marked Respondent's Exhibit A-5, tell us whether or not you had any salt herring, or barrels of herring, in No. 3 lower hold?”

Mr. Hamlin: The objection is made to that question which was made in the last two objections.

The Court: The Court will make the same ruling. You may state your position for the record in order to preserve your position on the record.

Mr. Wakefield: My position is the same as before with this additional fact, Your Honor:

Mr. Wakefield on cross-examination and on direct examination said that he never had had any herring stowed from his plant in Number 3 lower hold.

The Court: Mr. Who said that so?

Mr. Wakefield: Mr. Wakefield, the libelant's president. I now produce this hatch list to show [263] that his herring was carried in Number 3 lower hold.

The Court: If that is the theory upon which this is offered I will ask Counsel for the libelant to respond to that as this is rebuttal evidence rebutting positive testimony to the contrary of that offered by libelant.

What have you to say about that?

Mr. Hamlin: I believe the question was asked of Mr. Wakefield on cross-examination and his re-

(Deposition of Arney Burns.)

sponse, as I recall it, was that he did not recall but he would not deny that such a stowage had been made before.

The Court: The ruling will stand, if that is the status of it.

Mr. Wakefield: If the Court please, I don't like to argue this unduly but the witness——

The Court: The Court directs that you stop arguing it unduly and I will say this to you: Is there any other testimony by word of mouth which you can produce during the remainder of the afternoon so as to give you an opportunity to find authority which you ought to have on a question like this,—which both sides ought to have on a question like this—if it is of such great importance? Naturally, [264] I would welcome such authority.

Is there any other testimony available to you which you intend to offer in this trial which you could now produce if the Court permitted you to interrupt the reading of this deposition until some other time?

Mr. Wakefield: Yes, I have lots of testimony but——

The Court: The reading of this deposition can be interrupted at this time and you can proceed with some other testimony if over night you think you can find some authority which will help this Court to avoid what you content is plain error, on your part. Such authority will be welcomed, Mr. Wakefield. But the Court's ruling will stand until

(Deposition of Arney Burns.)

you show the Court some authority which will alter that ruling.

I wish opposing counsel to take advantage of the same opportunity to find any authority which he thinks controls this court's action and supports or tends to support his position in the matter.

If you wish to do so, the Court will interrupt the reading of this deposition to give you the privilege of saving this point until tomorrow morning if you think you will not finish this afternoon [265] normally, and give you the right to call some other witness and let's proceed and not take up any more time arguing this matter now. Which is your preference?

Mr. Wakefield: I would be most happy to comply with Your Honor's suggestion but frankly I don't know what I would look for if I tried to find authority.

The Court: You don't? I am sure that I don't.

Mr. Wakefield: I don't see the basis of the objection.

The Court: I merely offer that for whatever it is worth. You are not required to accept and you may proceed with the reading of this deposition in respect to the parts not objected to and as to which the Court does not sustain objection.

Mr. Wakefield: Do I understand Your Honor sustains objection to the offer of libelant's Exhibit A-5?

The Court: I doubt if that is what is now before the Court.

(Deposition of Arney Burns.)

I thought what was before the Court was another way of getting at the same object, the inquiry as to which had been objected to and the objection [266] was sustained. I didn't realize at this moment that that exhibit was now being offered.

If you wish to offer it, I will rule upon the offer in case there is any objection.

Mr. Wakefield: At this time I would like to offer in evidence Respondent's Exhibit A-5 which is a Hatch List of Number 3 hold on Voyage 54, the voyage immediately preceeding the voyage in question which shows that 900 odd barrels of herring from Port Wakefield, shipped by this same libellant, were stowed in Number 3 lower hold between the shaft alleys.

I will connect up the exhibit by showing there was no damage to the herring by another witness. I offer the exhibit for two purposes; the first purpose being to prove that the stowage of herring in Number 3 hold is usual, customary and proper. I offer it for the second purpose, that Mr. Wakefield testified that the Denali always made a starboard landing at Port Wakefield and loaded herring into Number 1 hold and that this was the only time he could recall that herring had been loaded into Number 3 hold.

This exhibit is offered to impeach that testimony and to show that within less than thirty [267] days prior to this shipment in question he had had over 900 barrels loaded in this same hold on this same ship.

(Deposition of Arney Burns.)

The Court: That last thing as to whether or not this is rebuttal, is the situation any different now than it was a moment ago when Mr. Hamlin responded to that?

Mr. Hamlin: I know of no difference, Your Honor.

The Court: You may state your objection to this offer, if you have any.

Mr. Hamlin: Libelant objects to the introduction in evidence of Respondent's Exhibit A-5 on the ground that it is not material to any inquiry in this action, merely showing that at some prior time a shipment came through without damage, and that it has no bearing on what occurred in this case. It does not support any of the defenses open to the respondent but is simply to show that on other occasions this hold did not damage the cargo.

It must be shown that the damage to this cargo was damaged by something for which the respondent is not liable and the burden is upon him to show that. We start out with the theory [268] that the carrier is the insurer of the cargo but he may escape liability by showing some one of these excepted causes.

The second ground upon which it is objected to as being untenable is that I do not believe Mr. Wakefield ever made a flat statement of any kind about where any prior cargoes were shipped on board the Denali and even if he did so, that mere fact does not make that field of testimony relevant to this inquiry.

(Deposition of Arney Burns.)

The Court: The objection is sustained subject to the same condition the Court previously noted. Counsel in finding some authority controlling upon this court's action will be favoring the court in finding it so that the court may change the ruling if it should be changed.

Proceed.

Mr. Wakefield: In view of the Court's ruling and without waiving my contentions, I request that the deposition of Mr. Burns, being read, be suspended on page 18, line 10, with leave to continue the deposition at a later time.

The Court: That request will be granted.

You may step down.

(Mr. Crutcher, who had been reading the [269] answers to the deposition stepped down from the witness stand.)

The Court: Call the next witness.

Mr. Wakefield, the Court is informed that the original deposition here in question has been filed in the Clerk's Office now. The same is now published.

Call the next witness.

Mr. Wakefield: Mr. Teichroew.

P. A. TEICHROEW,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Your name is P. A. Teichroew?

A. P. A. Teichroew.

Q. That is Dutch, is it, Mr. Teichroew?

A. That is right.

Q. What is your occupation? [270]

A. Purser on a freighter.

Q. How long have you been going to sea?

A. Well, continuously the last time since January, 1945.

Q. Were you on the SS Denali on Voyage 55 in August and September, 1946? A. I was.

Q. Were you purser at that time?

A. Technically on the Articles, "Senior Assistant." On the Danli there is a Chief Purser, Senior Assistant and two Junior Assistants. But actually they call them Chief Purser, and Purser. We always signed as Purser but I was actually Senior on the Articles.

Q. Do you recall the time that the Denali called at Port Wakefield on August 23rd, 1947, to load herring? A. I do.

Q. What did you do on this occasion with respect to the herring,—I mean, what is your job?

A. Well, my job is to sign the bills of lading, to inspect the shipment first,—to count it. And that particular ship the Juniors were supposed to do it

(Testimony of P. A. Teichroew.)

and I was breaking in a new one. That is why I particularly remembered the day.

Q. Did you count the herring that was loaded on this [271] occasion?

The Court: Do you mean the barrels?

The Witness: The barrels, sir,—I am sorry.

Q. (By Mr. Wakefield): When the Denali came into the dock, tell us what you observed with respect to barrels of herring?

A. I called the new junior's attention to the fact that there were quite a few of them. I guessed at it at around 400. They were around the outside and could easily have been guessed at three high. I also noted that they were stacked so you could note any leakers.

Q. You say these were stowed outside. What do you mean "outside"?

A. They were out on the dock in front of the warehouse.

Q. Did you later go ashore and make inspection of these barrels?

A. Oh, yes. I was ashore most of the time until everything was loaded.

Q. What was the condition of the barrels out on the dock?

A. Very good condition. I didn't find any leakers at all. They were dry.

Q. Were the barrels covered with anything?

A. No.

The Court: May I ask for the Court's convenience that you remind me of what dock in what place you are speaking of at this time?

(Testimony of P. A. Teichroew.)

The Witness: I am sorry. Port Wakefield, Alaska.

The Court: In other words, it was the dock from which the barrels of herring were loaded onto the ship, is that it?

The Witness: That is right, sir.

The Court: You may proceed.

Q. (By Mr. Wakefield): Were these barrels covered at the time?

A. They were not covered when we came up, no, sir.

Q. Were they wet or dry? A. Dry.

Q. Mr. Teichroew, did you have any occasion to put your hands on any of these barrels or feel them?

A. We automatically, when we are counting, walk along and put our hands on the barrels as we go down the rows. We all count barrels that way,—put our hands on them and walk down the row to count them.

Q. What would you say as to whether the barrels were cold or warm?

A. They were warm. Well, they were in the sunshine. [273]

Q. They were in the sun at the time, and the barrels were warm? A. Yes.

Q. Did you load that lot first from the face of the dock? A. We did.

Q. And then where were the rest of the barrels stored that you loaded?

A. They were immediately inside the warehouse.

(Testimony of P. A. Teichroew.)

on each side of the entrance, going back to the reduction plant.

Q. How far, roughly, is that from where the barrels were on the dock?

A. Oh,—just, it can't be forty feet from the door. I don't believe it is over thirty feet from the bulrail to the front of the warehouse.

Q. Were these barrels that were in the warehouse in the front end of it, toward the ship?

A. Yes, right next to the door.

Q. From your experience is it customary to find—in stopping at herring plants,—to find barrels of herring out on the dock uncovered and dry?

A. It is customary to find them out on the dock ready to load but not necessarily dry, no.

Q. What condition are they usually in when you load them from the dock? [274]

A. I can best answer that by saying how they were at the next dock.

Q. Well, we will go to that. After the ship left Port Wakefield, where did you next load?

A. We went to the next dock at Port Vita.

Q. Where were the herring barrels there?

A. Out on the dock. They were all wet. They had been soaking them down because they were covered with water up to the chine. I believe that is described as the chine,—that part of the barrel that comes up over the lid.

I told the loader to roll them over and look for leakers. That was all I was interested in was seeing that the barrels were in good condition before being loaded on the ship, on the outside.

(Testimony of P. A. Teichroew.)

Q. Going back to Port Wakefield, what did you observe as to the condition of the barrels on the inside of the warehouse, as to whether they were wet or dry?

A. I would say they were not as dry. They seemed to be damper, naturally, inside.

Q. Did they have water on them?

A. No. They were stacked the same way. They were stowed on their sides, two and three high.

Q. How long were you on the Denali, Mr. Teichroew?

A. I was on the Denali all of 1946 and I got on her [275] the fall before. I would say thirty days after the war ended. That was about the time I got back from Okinawa—I can't give you the dates—in 1945.

Q. During that time that you were on the Denali, can you tell us whether or not barrels of herring were loaded and stowed in Number 3 and Number 4 lower holds? A. They were.

Mr. Hamlin: That question is objected to as being wholly immaterial.

The Court: The objection is sustained for the reasons stated before provided that if the Court is convinced by authority later to be discovered by counsel that the ruling is wrong, the court will give to counsel an opportunity to recall the witness to propound it.

This question and answer is stricken and the Court will disregard it.

Mr. Wakefield: May I make an offer of proof?

(Testimony of P. A. Teichroew.)

The Court: You may make an offer of proof at this time.

Mr. Wakefield: I offer to prove by this witness that during the time that he was on the [276] Denali—as he testified to—that barrels of herring were customarily and frequently carried in Number 3 and Number 4 lower holds between the shaft alleys; that he frequently has been in those holds when they were loaded and that he knows of his own experience and knowledge that those holds are cool, that they are not warm; that on northbound voyages from Seattle to Seward and other ports, he knows of his own knowledge that perishable cargoes are customarily carried in Number 3 and Number 4 holds, such commodities consisting of such goods as eggs, lard, onions, potatoes and so forth, and that such cargoes are carried successfully and without damage.

Mr. Hamlin: Any and all of the evidence referred to in counsel's offer of proof is objected by libelant on the ground it is wholly immaterial and not in support of any defense open to the libelant or to any rebuttal.

The Court: The objection is sustained subject to the same condition which I previously stated. Proceed.

Q. (By Mr. Wakefield): Mr. Teichroew, in connection with this particular voyage of the Denali, Voyage [277] 55 from Port Wakefield to Seattle, were you down in Number 3 or Number 4 lower holds on any occasion?

(Testimony of P. A. Teichroew.)

A. I was in both holds.

Q. What was the occasion for your going down into those holds?

A. I checked myself for stowage because I have to type up these hatches and I have to make a consist ready at the last port to be wired in in advance of our arrival. So I want to be sure as to what I am turning into the agent before I come down.

I also come down every trip. It is part of our duty to make reports on damaged cargo of any kind northbound, and I want to know where it comes from because the Claim Agent and the Superintendent want to know where it happened, whether the sailors are doing it or who is and the only way I can do that is to go down below.

Q. On this particular voyage that is in question here, southbound, did you at any time find either Number 4 or Number 3 lower holds to be hot or warm?

A. I did not.

Q. Did you find those holds to be normally cool?

A. They normally were cool.

Q. Was there anything that occurred on this voyage, to your knowledge, that could account for any condition [278] to change the condition that you just mentioned?

A. Not to my knowledge.

Q. Mr. Teichroew, can you tell us generally the characteristic of the Port Wakefield plant and dock,— I mean in comparison to other docks that you stop at up there?

(Testimony of P. A. Teichroew.)

A. Much smaller is my recollection. I have nothing to do with docking or coming in.

Q. But it is a small dock?

A. I happened to notice it is quite small.

Mr. Wakefield: I think that is all.

The Court: You may cross-examine.

Cross-Examination

By Mr. Hamlin:

Q. Mr. Teichroew, do you recall approximately how high the warehouse is on the Port Wakefield dock at the point where the 400 barrels you have mentioned were stored as the Denali approached the dock?

A. My recollection is that it would be 10 or 12 feet there in front.

Q. Can you state approximately the time of day you arrived there at Port Wakefield?

A. I would describe it as a day just like today. [279]

Q. I say the time of day?

A. Oh, the time of day? I thought you said type of day. I am sorry. I would have to look at the record on that because I am up 24 hours sometimes and I don't know. The sun was shining.

Q. The record shows that it was somewhere between 11:00 and 12:00 in the forenoon. You say the sun was shining?

A. The sun was shining, yes.

Q. Had the sun been shining all morning that day?

A. To the best of my knowledge it had.

(Testimony of P. A. Teichroew.)

Q. You think that was an entirely clear morning, do you?

A. It was a very nice day to my recollection because I do know it was dry and nice there.

Q. How was it during the rest of the afternoon; did the sun keep on shining all day?

A. It seemed to me I was up most of the night. If I remember rightly we were loading—I can't tell. It might have rained during the night, I don't remember.

Q. I mean up to the time that the sun went down during the evening.

A. It seemed to me it was a nice day all day.

Q. No clouds at all in the sky?

A. That I wouldn't remember. There could have been.

Q. How about the day just before this; was it clear [280] all day that day, too?

A. There are some very nice days but I couldn't hope to remember back a couple of years back,—all of the days. I wouldn't want to state.

Q. You don't recall whether or not on any other day in August, 1946, except on the 23rd, is that right?

A. No. The weather was very nice the next day, too, on the 24th.

Q. Any clouds, do you know?

A. Not that I remember of.

Q. No clouds?

A. Oh, there could have been clouds but what I call good weather is when we don't have to put on our raincoats.

(Testimony of P. A. Teichroew.)

Q. That was the 24th of August, wasn't it? And on that day you were at the Port Vita dock?

A. On the next day we were at Port Vita. I don't remember any rain there at all. But I do remember distinctly there were quite a few mosquito.

The Court: Is it your intention to be understood as saying in effect there was no rain while you were taking on board this Apex Company herring?

A. I don't remember of any, Your Honor. I don't remember of any rain at all.

Q. (By Mr. Hamlin): On either the 23rd or 24th of [281] August, did your vessel approach or go to the Port of Kodiak, Alaska?

A. We must have been there either coming or going and possibly both ways because we always make Kodiak a port of call.

Q. As I understand it it wasn't cloudy on either August 23rd or 24th, is that right?

A. I don't....

Mr. Wakefield: I object to that as quibbling with the witness.

The Court: I didn't hear him say as to clouds. I thought he confined his statement to open weather, no rain.

The Witness: No rain.

Q. (By Mr. Hamlin): What is your statement as to clouds?

A. My recollection is that the sun was shining brightly when we got to Port Wakefield, and I don't remember any rain there for a couple of

(Testimony of P. A. Teichroew.)

days. I don't believe I got my rain clothes out there for several days.

Q. What does it mean when it is said that a barrel of salt herring is a leaker?

A. Oh, in loading sometimes a stave may be split slightly and the water runs out. No shipper wants the shipment to go out that way and they instruct their [282] coopers to fix them before they go aboard. Of course, we don't want any leakers either.

Q. Was it necessary for you to touch every one of these barrels?

A. No. You see, I just go down the row and count them as I go. I am sorry to say that I even do that with fish meal.

Q. Was any portion of this shipment in any area of shade when you arrived there?

A. Not out in front of the dock.

Q. No shade at all? A. I didn't see any.

Q. Was it piled up against the warehouse?

A. That is right.

Q. That warehouse was 12 feet high, I think you said?

A. It was only piled up three high,—that is, three on the slant.

Q. I suppose up there in that latitude, the sun is not straight overhead, is it, at noon?

A. No. But I have been badly burned in April or May.

Q. About what angle is it,—45 degrees in the sun?

(Testimony of P. A. Teichroew.)

A. I am sorry; I am really just the office boy. I don't pay any attention to the sun or the angles or the latitude. But I do know it gets very warm.

Q. Were these barrels exceptionally hot, as you felt them? [283]

A. No. But they were definitely warm. They were warmer than they were inside. That I remember. But I thought nothing of it because naturally they would be warmer in the sun.

Q. Calling your attention to Libelant's Exhibit 6, which has been admitted in evidence, would you please look at the signature down in the lower right-hand corner of Libelant's Exhibit 6 and tell me whether or not that is your own signature?

A. That is my own signature.

Q. Did you prepare this bill of lading, Libelant's Exhibit 6?

A. That I can't remember. I often do. I believe usually Apex Fish prepared their own. I don't remember. I use so many typewriters that I couldn't——

I imagine this was made by Apex Fish Company, but of course——

Q. Was it already typed out when you signed it?

A. I don't want to go on record on that. It could have been. I think it was for this reason, because I see in my writing again, after the word "quarters" I have put in "bbl." in parenthesis, so it possibly was already written out and I did that "bbl." to clarify it more for the freight clerk who would be [284] typing up the freight bill. He

(Testimony of P. A. Teichroew.)

wouldn't know what a quarter of salt herring was. So I put in the "bbl." That is my writing there, too.

Q. How does it happen, Mr. Teichroew, that you did not insert on this bill of lading some statement tending to note that these barrels were so dry and hot when they came aboard?

A. I thought nothing of it, really. It came to my mind that they were warm because it was out in the sun. They had told me repeatedly that salt herring was cured and it wouldn't be hurt,—that it didn't have to be put in cold storage, so I didn't consider that there would be anything wrong with it.

Q. You didn't consider that to be a matter of consequence?

A. It obviously is but I didn't then,—that is for sure.

The Court: The Court thinks that the proceedings had better be recessed at this point. I would like counsel on both sides to take advantage of this recess taken an hour earlier than yesterday with a view to trying to produce some authorities on this question which Mr. Wakefield has so earnestly presented here today.

Mr. Wakefield: Before the Court adjourns, may I offer Respondent's Exhibits A-1, A-2, A-3 and [285] A-4 in evidence?

Exhibit A-5 was rejected.

Mr. Hamlin: My memory of those is somewhat clouded.

Can ruling be reserved?

(Testimony of P. A. Teichroew.)

Mr. Wakefield: A-1 is the log book. A-2 is the actual hatch list for this voyage. A-3 is the stowage plan for this voyage. A-4 is the photostat copy of a sketch of the hold.

Mr. Hamlin: I have no objection to any of those.

The Court: Each of them is now admitted.

In fact, all of them are admitted except Respondent's Exhibit A-5—all of them in this series.

(Respondent's Exhibits A-1, A-2, A-3 and A-4 received in evidence.)

(Respondent's Exhibit A-5 rejected.)

The Court: Court is now adjourned until tomorrow at 10:00 o'clock.

(At 4:30 p.m., Wednesday, July 14th, 1948, proceedings recessed until 10:00 a.m. July 15, 1948, in the United States Court House.) [286]

Seattle, Washington

July 15, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: Are counsel ready to discuss the matter concerning the admission of evidence that was before the Court yesterday and continued until this morning?

Mr. Wakefield: I wonder if the Court would have any objection to my calling several other witnesses, first?

The Court: Whose testimony will not involve that point?

Mr. Wakefield: That is correct.

The Court: You may do that, Mr. Wakefield.

Mr. Wakefield: Mr. Sharp, will you step up, please? [287]

HAROLD VICTOR SHARP,

called as a witness out of order on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Mr. Sharp, will you state your full name, please? A. Harold Victor Sharp.

(Alaska Steamship Company Cargo Receipt marked as Respondent's Exhibit A-7 for identification.)

Q. (By Mr. Wakefield): Mr. Sharp, what is your occupation?

A. I am a waterfront checker.

Q. Where do you work?

A. I work at all the piers around the port, wherever I happen to be dispatched.

Q. Were you checking cargo on the Denali on September 4th, 1946, at Bell Street?

A. Yes, according to my time records that I keep, why, I worked the night of September 4th, 1946, at Pier 66 on the Denali. [288]

Q. What does the checking that you do include; just what are your duties?

A. Well, it varies with the various jobs I am on. In the case in question they were half barrels of salt herring from the Number 3 hatch first—

(Testimony of Harold Victor Sharp.)

and I believe we moved to Number 2 later—but anyway from Number 3 hatch we were landing them in a cargo net on the dock. I would count each load as the men would roll them in.

Q. Did you prepare as a result of the discharge of that herring a cargo receipt or O. S. & D. report? A. I did.

Q. Referring to what has been marked Respondent's Exhibit A-7, now in front of you, is that the O. S. & D. report?

A. That is the one I made out and signed.

Q. Does that bear your signature?

A. It does.

The Court: In this connection will you give the witness an opportunity to explain in the record the meaning of the letters O. S. & D.?

The Witness: O. S. & D. is a term we have on a report for over, short and damaged cargo.

The Court: In other words, "O" means over, "S" means short, and "D" means damaged?

The Witness: That is correct. [289]

The Court: Proceed.

Q. (By Mr. Wakefield): What is the date on the O. S. & D. report showing date of delivery of the cargo? A. 9/4/46.

Q. Can you tell us now what time of day that was discharged on the 4th of September?

A. It was discharged on the night of the 4th, including the morning hours up to 6:00 o'clock on the 5th. But we always figure,—and in signing, figure the date that the work started. That is, we

(Testimony of Harold Victor Sharp.)

carry through in signing. We don't sign for anything received from 1:00 o'clock in the morning to 6:00 o'clock in the morning as being on the following day. It is still on the former day's date.

Q. How many barrels does that show discharged?

A. It shows 971 half-barrels delivered.

Q. Can you tell us what hold on the ship that came from?

A. Frankly, from the O. S. & D., it does not show.

Q. Do you recall from your own recollection what hold it was?

A. Yes. It must have been Number 3 hatch. It was the first hatch aft of the house.

Q. Does that O. S. & D. report contain any notation as to the condition of the cargo? [290]

A. Yes, I made a notation here.

Q. It that your notation?

A. That is my notation.

Q. Was it put on at the time you made the O. S. & D. report?

A. I filled in the O. S. & D., and signed it. Before the dock would sign for it they wanted a notation on there in regard to the claimed damage, so I wrote that in there and then they signed it.

Q. What does that notation state?

A. It says, "971." Then I made a notation "Dock claims concealed damage by heat."

Q. Mr. Sharp, were you advised of the claimed damage during the discharge of the herring?

(Testimony of Harold Victor Sharp.)

A. I was. We were discharging herring from approximately 9:00 o'clock on as I remember it. It takes a little time to uncover and rig and get ready to go.

Q. After you heard that there was claim of damage, did you look at any of the barrels?

A. At my first opportunity. I think it was around midnight before I looked at any of them because I had to catch my count at the hatch as each load came out.

The Court: Near midnight on what dates?

The Witness: On the 4th. [291]

The Court: September 4th.

Q. (By Mr. Wakefield): Did you feel any of the barrels with your hands or otherwise?

A. I did, when I looked at them. The fish was cooked the way they expressed themselves. That is, the men that refused to buy them on account of the condition they were in—a buyer from Canada as I remember it made the remark that the fish was cooked, that all it was fit for was fertilizer. I wondered how they got cooked and I figured if they were the barrels would have to be hot. I felt some of them.

Q. Were the barrels hot or warm?

A. They weren't cold. They would be just what you would call the chill taken off of them. If I put my hands in water, of the same temperature I would say it was tepid, that was all. It was certainly not warm enough for cooking to suit my taste.

(Testimony of Harold Victor Sharp.)

Mr. Wakefield: I offer Respondent's Exhibit A-7 in evidence.

Mr. Hamlin: No objection.

The Court: Admitted.

(Respondent's Exhibit A-7 received in evidence.) [292]

The Court: Did the witness use the word or the term "tepid" or some such term?

The Witness: Yes.

The Court: You did that on September 4th, when you felt the temperature?

The Witness: Yes. They also opened some of the fish barrels that morning and oil had risen to the top of the barrels,—not a great deal of oil but enough fish oil to show.

The Court: Are there any further questions? You may step down.

(Witness excused.)

Mr. Wakefield: Mr. Felton. [293]

MICHAEL WILLIAM FELTON,
called as a witness out of order by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your full name, Mr. Felton?

A. Michael William Felton.

Q. And what is your occupation?

A. Port Engineer for the Alaska Steamship Company.

(Testimony of Michael W. Felton.)

Q. How long have you been Port Engineer for the Alaska Steamship Company?

A. Five years.

Q. What did you do prior to that time?

A. Marine Engineer on the ships,—all the way from Third Engineer to Chief Engineer.

Q. That is, actually sailing aboard the vessels as Engineer?

A. Yes; for the last twenty years.

Q. As Port Engineer for the Alaska Steamship Company, what generally are your duties?

A. Oh, the manning of the ships, looking after the repair [294] of the vessels,—that is principally my duties.

Q. In that capacity are you fully familiar with the construction and equipment of each vessel and the characteristics of them?

A. Yes; pretty much so.

Q. Are you frequently aboard these different vessels?

A. Yes,—many times.

Q. Are you familiar with the Denali?

A. Yes.

Q. Have you been aboard the Denali on many occasions?

A. Yes; lots of times every trip.

Q. You say every trip?

A. Yes.

Q. With reference to Number 3 lower hold and Number 4 lower hold on the Denali, will you tell us whether or not there are any steam pipes in either of those two holds?

(Testimony of Michael W. Felton.)

Mr. Hamlin: That question is objected to on the ground it is immaterial. The evidence requested is negative in character and not positive. By that I mean I believe it is open to the respondent here to show positively that these barrels were not warm but it proves nothing to show simply that there were no steam pipes in the hold. [295]

The Court: The objection is overruled upon condition that the inquiry be confined in point of time to the time during which the cargo in question was in the hold in question.

Mr. Wakefield: Yes, Your Honor. We will do that.

Q. (By Mr. Wakefield): The question was whether there are any steam pipes in the 2, 3 or 4 lower holds of the Denali.

The Court: Fix the time, Mr. Wakefield.

Q. (By Mr. Wakefield, continuing): —with reference to August and September, 1946.

The Court: I believe the time during which this carriage was being undertaken was August 22nd or 23rd to September 5th, or was it not?

Mr. Wakefield: No. August 23rd to September 4th, when they discharged, as the last witness testified.

The Court: Concerning that time let the witness consider the question.

A. There are no steam pipes in the lower holds of 3 and 4. I do believe there is a radiator line in the 'tween deck of Number 4. [296]

(Testimony of Michael W. Felton.)

Q. (By Mr. Wakefield): How are the winches on the Denali operated?

A. Electric winches.

Q. What is the steering engine?

A. A steam winch.

Q. Mr. Felton, with respect to Number 3 and Number 4 lower hold at the time in question, namely, August 23rd to September 4th or 5th of September, to your knowledge, were there any conditions of those holds which would produce any artificial heat?

The Court: Do you mean structural conditions?

Mr. Wakefield: Yes; such as steam pipes or other means of producing heat in the hold.

A. That was during the voyage, is that what you mean?

Q. (By Mr. Wakefield): Yes.

A. There were no changes made that would cause any different conditions than on previous voyages.

Mr. Hamlin: May I ask that be stricken on the ground it is not responsive to the question?

The Court: It is not responsive and should be stricken on that ground and it is so ordered.

Q. (By Mr. Wakefield): Mr. Felton, what I have reference to is the condition of 3 and 4 lower holds on the [297] Denali at this particular time that we are talking about as to whether physically there were any conditions in either hold which would account for or produce any artificial heat?

A. No.

(Testimony of Michael W. Felton.)

Q. Do you recall the instance of the strike on September 5, 1946? A. Yes.

Q. What, if anything, did you do on the morning of September 5, 1946, with respect to the Denali?

A. The ship was shut down due to the strike the morning of the 5th.

Q. Were you aboard the ship that morning?

A. Yes.

Q. You say the ship was shut down? Will you tell us in detail what you mean by "shut down"?

A. Well, to shut a ship down,—the engine room part, first, to begin with, we try to take the—

The Court: Try to answer what is called for in this instance rather than the custom or "sometimes" or "ordinarily" and that sort of thing.

Mr. Wakefield: Yes.

Q. (By Mr. Wakefield): What was done on this occasion to shut down the ship? [298]

A. The engineers, one of their first duties is to cut out a main condenser. When I say "cut it out" they take the steam—

The Court: It doesn't appear, Mr. Wakefield, that this witness is talking about what occurred on this ship on this occasion. His words would indicate what might happen on any similar ship on a similar occasion.

Q. (By Mr. Wakefield): Is this what happened on the Denali at this time?

A. This is what actually happened on the Denali on this morning, yes. It is the only way they

(Testimony of Michael W. Felton.)

can shut a ship down. They shut off the condenser and then they begin shutting off the stop valves on the boilers, all the sea valves and overboard valves. That means shutting down the light plant. That would call for shutting down all the force ventilation, the blowers, fans, all the force draft equipment in the engine room. That is the engine-room part.

On deck they secure all the gear. What I mean by that is that they secure the booms, they put the hatch covers on, close them up, and the last duties of the engine room on deck is to close the water-tight doors or the doors and ports that would let any [299] air and water into the ship,—to protect it. That was done on the Denali before the crew left.

Q. And you were down there at the time to supervise and see that this was done?

A. Just to see that it was done, yes.

The Court: Is it fair to say, so far as the truth is concerned, that the ship's lower Number 3 holds and Number 4 holds were sealed so far as working or cargo is concerned?

The Witness: The hatch covers were put on the top to keep the rain and water out, yes.

The Court: At this point I would like to interrupt the examination to try to help counsel in one or two other cases.

(Short recess.)

The Court: You may resume the examination of this witness.

(Testimony of Michael W. Felton.)

Q. (By Mr. Wakefield): Mr. Felton, at about what time on the morning of September 5th, 1946, was the Denali completely shut down?

A. It was completed about 10:30 in the morning.

The Court: What day? [300]

The Witness: Of September 5th.

The Court: In other words, the strike became effective in all respects so far as working the ship was concerned?

The Witness: That is right, sir.

Q. (By Mr. Wakefield): After the ship had been shut down as you described about 10:30 a.m., did the crew then all leave?

A. Yes. They left promptly after that. Their duties were over,—I am speaking of the engineers,—they packed their clothes and left.

Q. Who was left aboard the ship?

A. A ship's watchman.

Q. Mr. Felton, what can you tell us as to the effect of the shutting down of the ship as you have described it as to the heat in the holds, or in the ship generally?

Mr. Hamlin: At this point I object. He is asking for the witness' opinion. He hasn't shown that he is qualified.

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: I think you ought to ask him if he knows or what is the basis of it and qualify him.

(Testimony of Michael W. Felton.)

Q. (By Mr. Wakefield): Do you know the answer to that question? A. Yes.

Q. Do you know the effect as to heat of the shutting down of the ship generally?

A. I do as to the Denali.

Q. Do you know because you were there?

A. I was there.

The Court: You might ask him upon what facts that is based.

Mr. Wakefield: I was going to have him explain.

The Court: It is really better practice to lay the foundation without asking in detail first. That is always true in my opinion whenever there is an objection made to the qualifications of the witness.

Q. (By Mr. Wakefield): Mr. Felton, have you had the actual experience of observing the effect of shutting down the ship? A. Yes. [302]

Q. Do you know the effect it had on this occasion of September 5th that you have just described? A. Yes.

Q. Will you go ahead and tell us what the effect of shutting down the Denali had on the question of heat in the vessel and in the hold?

Mr. Hamlin: The same objection, if the Court please. I think the witness may show what he observed if he took the temperature. He is asking the opinion of what the shutting down did.

The Court: Overruled. You may answer the question.

(Testimony of Michael W. Felton.)

A. We got a call in the afternoon that the ship——

The Court: That is not quite within the limits of the question.

Q. (By Mr. Wakefield): We will get to that next. I just want you now to explain what effect the shutting down has on the heat within the ship and then the reasons why?

A. It warms up the whole ship considerably, especially in the engine room, shaft alleys and so forth due to all the ventilating fans, blowers, forced draft blowers for the boilers being shut down. The heat is still there and there is nothing to carry it away [303] due to the fact that the ship is all secured. All of the equipment down there still has the heat in it and it takes hours for it to cool. It has nothing to carry the heat out of the engine room, the fire rooms, shaft alleys and so forth.

Q. In shutting down the vessel are the various compartments open; I mean, is it necessary for the crew to go from place to place in the holds to shut down the ship?

A. Not too much in the holds. They put the hatches on the top and then in the engine fire rooms they have to go back and forth there. They have to go back to the after end of the shaft alleys, secure the stern glands. By that I mean they tighten up the packing so that the water doesn't leak in from the stern glands,—and they have to go to those compartments.

(Testimony of Michael W. Felton.)

Q. Would you say from your experience and your observation of the Denali and of other ships that after shutting down a vessel as you have described it, say for at least a period of 12 hours to 15 hours after shutting it down, that it would be warmer or cooler inside the ship and the holds?

A. I would say it would be warmer.

Q. Did you have occasion, Mr. Felton, to actually go down on board the Denali on the afternoon of [304] September 5th?

A. I did.

Q. About what time were you down there?

A. Between 3:00 and 4:00 o'clock in the afternoon.

Q. Did you go down into Number 3 hold at that time?

A. Yes.

Q. Will you tell us what the condition of Number 3 hold was at that time with respect to being warm?

A. The air was close, and seemed unusually warm?

The Court: On what date was that?

The Witness: The afternoon of the 5th.

The Court: About 3:00 o'clock, did you say?

The Witness: Between 3:00 and 4:00 o'clock. I don't exactly remember the time.

Q. (By Mr. Wakefield): What would you say as to whether or not the condition you observed at that time between 3:00 and 4:00 o'clock on the afternoon of September 5th with respect to the heat in Number 3 hold was greater or less than

(Testimony of Michael W. Felton.)

the condition of the hold when the vessel was in operating condition? A. It was warmer.

Mr. Hamlin: May it please the Court, we have an objection to that because it hasn't been shown [305] that this witness observed the operating condition of this hold during this voyage.

The Court: That might under some circumstances be well taken but in this instance, in view of this witness' former testimony concerning his duties, the Court overrules the objection.

Q. (By Mr. Wakefield): Have you been in Number 3 and Number 4 holds on occasions when the Denali was in operating condition; by that I mean not shut down as you have described them?

A. Yes.

Q. In the summertime, August or September, what is your opinion or observation as to what the temperature of Number 3 and Number 4 lower hold is as compared to say the outside atmosphere temperature?

A. On a hot day, when it is hot outside you go down in the lower hold of the Denali and other ships, it is cooler than it is up above due to the ship's side being exposed to the sea water which is around 40 to 45 degrees in the Sound and up to 54, which naturally cools the holds down.

Q. Is the Number 3 and Number 4 lower hold of the Denali below the water line?

A. Yes. [306]

Q. Does that in your opinion tend to cool the hold? A. Yes.

(Testimony of Michael W. Felton.)

Q. Would you say then that the hold as you found it on the afternoon of September 5th, was considerably warmer,—was it noticeably warmer than you have found it in operating conditions?

A. Only as I said before in the 'tween deck of Number 3 and Number 4. I was not in the lower hold. But the 'tween decks was warmer than usual.

Mr. Wakefield: You may inquire.

Cross-Examination

By Mr. Hamlin:

Q. Mr. Felton, are the living quarters of any of the crew in the after portion of the Denali or were they during this period from August 23rd to September 4th, 1946?

A. The Stewards' Department lives aft on the Denali, yes.

Q. Are those quarters where the Stewards' Department lives heated? A. Yes.

Q. What kind of heat is furnished them?

A. Radiator system? [307]

Q. Steam heat? A. Yes.

Q. Where are the pipes which feed that radiator system with respect to Number 3 lower hold?

A. They wouldn't go through the lower hold. They go back through the shaft alley and up the shaft alley escape into the lower quarters.

Q. Do they follow through the shaft alleys?

A. Yes.

Q. How large a line feeds that radiator system?

A. I would have to guess but it is usually

(Testimony of Michael W. Felton.)

about an inch and a half line going up and a half-inch return.

Q. That is real live steam going in there, is it not? A. Yes.

Q. Does it return as steam or as water?

A. It is water; it is condensed.

Q. Do you know which one of the shaft alleys on the Denali that line passes through,—whether it is port or starboard? A. No, I don't.

Q. I think you mentioned that the winches on the Denali are operated by steam, did you not?

A. The steering engine and the after capstan are steam and the after winches are electric. [308]

Q. The after capstan and the steering winches are steam? A. Yes.

Q. Are they fed with steam pipes coming from the engine room? A. Yes.

Q. Where did those steam pipes pass back to the after winch and the steering engines.

A. They go back through the shaft alley, up the shaft alley escape, through to the steering engine and the warping winch.

Q. How large are the lines which feed those pieces of equipment?

A. They are about three-inch steam and four-inch exhaust, approximately.

Q. Do you know which of the two shaft alleys on the Denali those steam pipes pass through?

A. No, I don't.

Q. Do you know where they are located within the shaft alley?

(Testimony of Michael W. Felton.)

A. Well, they are on the overhead,—probably six or eight inches from the top of the shaft alley tunnel.

Q. Do you know how thick the bulkhead is that covers the shaft alley?

A. I don't know for sure. I imagine it is $\frac{5}{8}$.

Q. $\frac{5}{8}$? [309]

A. $\frac{5}{8}$ of an inch; I imagine about that.

Q. Steel. Is that insulated in any fashion?

A. The steam lines are insulated but not the tunnel itself,—only a wooden sheeting over it.

Q. The sheeting I assume covers the unjointed portions but how about the joints?

A. I can't say whether they are covered or not. They are supposed to be,—maybe they are all covered, I don't know.

Q. Isn't it standard operating procedure aboard the Denali to leave the joints uncovered for adjustment?

A. That is not good engineering practice.

Q. You don't know what they did on the Denali?

A. No.

Q. Do you know how often joints occur on the steam pipe which passes through Number 3 lower hold into shaft alley?

A. No, I don't. Sections of pipe are 20 feet long and unless they had an accident they are 20-foot sections.

Q. Are there any inspection valves located in the portions of the steam pipes which pass through Number 3 or Number 4?

(Testimony of Michael W. Felton.)

A. No. The master valve for shutting the steam and exhaust off is in the engine room and the other two [310] are at the machines,—the steering engine and the warping winch.

Q. Are there any other steam pipes which pass through the shaft alleys in the Denali aft of the engine room?

A. There is more steam pipes back there that would be used on occasions. There are steam lines to the heating coils in the oil tanks.

Q. Do you remember how big those steam pipes are?

A. They are usually three-quarters and one inch.

Q. Is there any heat generated within the shaft itself as it lies within the alley, in operation; does it warm up through turning?

A. Well, I don't believe it would be noticeable.

Naturally, a bearing has a warmth when running but I doubt if it would increase the temperature of your shaft alley at all,—maybe one degree, if at all. It would be very negligible.

Q. I suppose that shaft lies in bearings as it passes through the alley? A. That is right.

Q. At what interval are those bearings placed?

A. Those shafts are probably about 24-foot length shafts. There are about four bearings on each shaft alley.

The Court: Do those bearings develop a [311] noticeable amount of artificial heat?

The Witness: Well, you could put your hand on the bearing and it is slightly warmer than the

(Testimony of Michael W. Felton.)

adjoining steel or the pedestal it sets on. It is just noticeably different. It is such a slow turning shaft that you have very little heat there.

Q. (By Mr. Hamlin): I note that you stated that during this particular voyage Number 55 running from August 25, 1946, to September 4, 1946, there were no conditions in your opinion which would produce artificial heat within lower Number 3 and Number 4 holds.

I ask you first whether or not you were present on the Denali during that voyage?

A. No, I was not.

Q. Do you base your answer solely on the determination made at the end of the voyage?

A. No.

Q. On what?

A. On the Chief Engineer's Report.

Any undue or unusual conditions on the ship, the Chief makes a report out on his log book and his abstract and that is where we get our information for the voyage.

The Court: Did you go aboard on any occasion [312] prior to 3:00 to 4:00 o'clock in the afternoon of the 5th of September?

A. Several times. I was aboard the morning of the 5th while they were securing the vessel.

Q. What about the 4th; were you aboard on the 4th?

A. I can't remember how many times I was aboard.

(Testimony of Michael W. Felton.)

The Court: What parts of the ship did you visit on those occasions?

The Witness: The engine room, fire room, and all over the deck as I look after the repair work.

The Court: All over the deck; do you mean the top deck?

The Witness: The top deck, main deck, dining rooms.

The Court: The cargo space; I am inquiring about cargo spaces.

The Witness: Yes.

The Court: Did you visit any of those other than Number 3 and Number 4?

The Witness: Prior to the 5th?

The Court: Yes.

The Witness: I can't remember that I did.

The Court: I am trying to see if you observed whether or not there was any other cargo whose internal [313] temperature, like cargo in sacks or grain or bulk or any cargo that might have heat in it,—did you observe any other cargo than this cargo that might have any heat inside of it?

The Witness: No, I don't remember it now.

The Court: Or inside of containers or packages?

The Witness: No, I don't remember.

The Court: Was there any steel loaded in there or any iron goods of any sort?

The Witness: I can't remember what all was in the hold. I only look after repairs and I didn't pay too much attention to it.

(Testimony of Michael W. Felton.)

The Court: Did you observe the condition of any other cargo besides this salt herring that is here in question that you then suspected or might now suspect had a temperature that was greater than the outside temperature?

The Witness: I don't at this time remember of noticing any cargo in the ship.

Mr. Wakefield: If the Court please, may I make a suggestion in that connection? We have already offered in evidence the actual hatch list which shows what the cargo was in each of the holds. That hatch list shows nothing but herring and canned [314] salmon.

The Court: I just wish to know what this witness observed, if anything, along that line.

You may inquire, Mr. Hamlin.

Q. (By Mr. Hamlin): Did you go into Number 1 hold of the Denali when you were aboard her on the 5th when she was shut down?

A. No, I didn't.

Q. At no time on the 5th of September did you go in there? A. No, I didn't.

Q. Has it been your experience that the same heating up process takes place in Number 1 hold as you have described in Number 3?

A. It has been my experience on ships that the holds warm up when the ship is secured, yes.

Q. Is that true of the Denali, too, and was it true at the time in question on September 5th?

A. I wasn't in Number 1 hold in question so I could only go by experience.

(Testimony of Michael W. Felton.)

The Court: Do you mean after the ship is made in condition for being under way on the voyage or something else?

The Witness: No; I mean when the ship is [315] first shut down,—secured to lay up with everything shut down.

The Court: You mean when working operations on the ship—loading or unloading cargo ceases—is that what you mean?

The Witness: Yes, when the ship is really closed up.

Q. (By Mr. Hamlin): When you did go into Number 3 on the afternoon of September 5th, it is true, is it not, that you went only down as far as the 'tween decks? A. That is right.

Q. You did not at any time on that afternoon enter the lower hold? A. No.

The Court: Do you know at this time how much of the cargo from Lower 3 and Lower 4 was discharged before 10:30 o'clock on the morning of the 5th of September, 1946?

The Witness: No.

Mr. Hamlin: No further questions, Your Honor.

The Court: You may inquire.

Is there anything further on redirect?

Mr. Wakefield: That is all. [316]

The Court: You may step down.

(Witness excused.)

The Court: I believe at this time we will take a short recess.

(Recess.)

The Court: You may proceed.

Mr. Wakefield: Call Mr. Hanson, please.

EMANUEL HANSON,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your name, please?

A. Emanuel Hanson.

Q. What is your occupation, Mr. Hanson?

A. Superintendent of the Alaska Terminal and Stevedoring Company.

Q. How long have you been engaged in that business? [317]

A. I have been a year on this present job but before that I was with the Alaska Steamship Company.

Q. In what capacity were you working with Alaska Steamship Company?

A. Chief Stevedore.

Q. How long were you Chief Stevedore for the Alaska Steamship Company? A. Since 1936.

Q. Prior to that time what did you do with the Alaska Steamship Company?

A. I was General Foreman on the ships.

Q. Stevedore foreman? A. Yes, sir.

Q. Have you ever been to sea?

A. Yes, sir.

Q. In what capacity?

(Testimony of Emanuel Hanson.)

A. Oh, A.B., Boatswain, and so forth.

Q. How long were you at sea before you did stevedoring?

A. Oh, since 1904 until 1921.

Q. In your job as you have related as stevedore foreman and while with the Alaska Steamship Company, have you become familiar with their different vessels?

A. Yes.

Q. Are you familiar with the Denali?

A. Yes. [318]

Q. Have you been in the holds of the Denali on many occasions?

A. I have.

Q. How frequently, Mr. Hanson, would you say that you have been in the different holds of the Denali?

A. Lately I will say once and twice, every trip she is in but before that I was up and down several times a day.

Q. How about in August or September, 1946; were you in the holds of the Denali at that time?

A. Well, I have forgotten. I can't say for sure. I wasn't down to Bell Street, I know that.

Q. But I mean during that period of time?

A. Yes.

Q. You were in and out of the holds?

A. Yes.

Q. What does your job consist of as stevedore foreman, what did you do?

A. I put on a foreman, hire the longshoremen, and start to discharge,—get the cargo out of the ship and get the cargo into the ship. That is my job.

(Testimony of Emanuel Hanson.)

Q. In putting the cargo into the ship, do you decide where it should go?

A. With the Alaska Steam I did, yes.

Q. You decided where to put the different types of cargo? [319] A. Yes.

Q. Are you familiar with the characteristics of the different holds on the Denali as to what cargo should be carried in the different holds?

A. Yes, sir.

Q. Based on your experience as you have related it, I will ask you your opinion as to whether Number 3 lower hold on the Denali is a warm or a cool hold?

Mr. Hamlin: That question is objected to.

The Court: Try to fix the time which is material here, Mr. Wakefield.

Q. (By Mr. Wakefield): —with reference to August 23rd to September 4th, 1946.

The Court: The objection is overruled.

A. It is not warm and it is not cool. It is an average hold. I would say they are all the same.

Q. (By Mr. Wakefield): What would you say with respect to lower Number 4 at the same time?

A. That is a cool hold. It is below the water line. It is the same as Number 3 I would think.

Q. Are both Number 3 and Number 4 lower holds below the water line?

A. Yes, sir. [320]

Q. State your opinion as to whether or not Number 3 and Number 4 lower holds at the time in question—August and September, 1946, were proper

(Testimony of Emanuel Hanson.)

holds for the stowage and carrying of salt herring in barrels?

A. In my opinion they are, yes.

Q. State in your opinion and from your observation of the loading of cargo as to whether Number 3 and Number 4 lower holds on the Denali at this time in question are fit and proper for the carriage of semi-perishable cargo such as citrus fruits, eggs, lard, onions, tomatoes, potatoes, candy and so forth.

Mr. Hamlin: That is objected to as being entirely immaterial to any issue in this case.

The Court: I am not at the present aware of what the materiality is, Mr. Wakefield.

Do you wish to make a statement about it?

Mr. Wakefield: Simply to show, Your Honor, that in this witness' opinion and from his experience they carry these perishable cargoes in these holds. He has actually loaded them in these holds.

The Court: The conditions of perishability respecting the last-mentioned commodities might be so different from that concerning salt herring in barrels; at least, there is no preliminary proof made or foundation laid of similarity which would [321] justify the comparison in question. The objection is sustained.

It is without prejudice to your right to inquire as to any similarity of the standards of care of these various commodities mentioned by you. If you lay the foundation that there was a similar-

(Testimony of Emanuel Hanson.)

ity in the kind and degree of care given to these various cargoes, you may do that.

Q. (By Mr. Wakefield): Mr. Hanson, with reference to the cargoes I enumerated a moment ago in my last question, are those cargoes in your opinion and from your experience apt to be affected by any degree of heat in the hold? A. Yes.

Q. And in stowing such cargoes aboard the vessel, do you always put them in cool holds where they will be subject to the least amount of heat?

A. We are always trying to put them in the best——

Mr. Hamlin: Libelant has objection to that question and to the entire line of evidence indicated. It is not material to any defense of the respondent. It simply, if anything, tends to follow their theory that they followed due care in this shipment which is not a defense. It does not tend to either aid or [322] disprove the condition of the goods upon arrival or, (b) to explain why they were in that condition or, (c) to show that the condition came about as the result of some cause excepted under the Admiralty Law or the Bill of Lading, thereby relieving the carrier of any liability. It doesn't prove anything after they have proved the defense.

The Court: Because the Court understands that the questions now being asked are meant to lay the foundation for inquiring concerning the suitability of the space in question for any and all

(Testimony of Emanuel Hanson.)

kinds of perishable cargo usually carried by ships of this type, the objection is overruled.

“Any and all types of perishable cargo” includes, as the Court understands it, for the purposes of classification at any rate, barrels of salt herring.

Mr. Hamlin: May the libelant have an exception, please?

The Court: Allowed. You may answer this question if you remember the question, Mr. Hanson. If you do not, the Court will have the question read.

The Witness: I would like it read.

(Last question repeated by the reporter as follows: [323])

“Question: And in stowing such cargoes aboard the vessel, do you always put them in cool holds where they will be subject to the least amount of heat?”)

A. Yes, we do.

Q. (By Mr. Wakefield): In your opinion and from your experience, Mr. Hanson, is Number 3 such a hold? A. Yes, sir.

Q. I meant lower hold; is Number 4 lower hold such a hold? A. Yes, sir.

Q. And your answer as to Number 3 applied to the lower hold, did it?

A. The lower hold, yes.

The Court: Ordinarily, Mr. Hanson, as you remember it when you were going to sea and actu-

(Testimony of Emanuel Hanson.)

ally engaged as a member of the ship's crew, what person on board ship employed as a member of the complement of officers and men ordinarily prepared the ship's list showing the space where each particular type of cargo should properly be loaded on a particular voyage?

The Witness: The Chief Officer.

The Court: The Chief Officer is the fellow [324] who makes up the tentative cargo list, is that what you call it?

The Witness: Well, he is the one who sees where it goes in the ship.

The Court: He makes up a plan of stowage.

The Witness: That is right.

The Court: What do you call it?

The Witness: Stowage plan.

The Court: Then does the Super Cargo or the Superintendent of Loading operations then check the loading against that cargo list and note what happens to the cargo so far as placing it in the ship with respect to the suggestions on that list of what cargo should go where?

The Witness: No. Up North the Chief Officer does that. Down here the Chief Officer at Alaska Steam hasn't had too much to say about it but when he brings a suggestion in it is always taken.

The Court: Who does have "too much" to say about it?

The Witness: Well, I have had, so far.

The Court: Quoting the words "too much."

(Testimony of Emanuel Hanson.)

(Four papers, marked "Hatch List" marked as Respondent's Exhibit A-2 for identification.) [325]

Q. (By Mr. Wakefield): Mr. Hanson, you have before you what is marked Exhibit A-2 and has been admitted in evidence as Respondent's Exhibit A-2.

Is that the hatch list of the Denali for Voyage 55 southbound? A. Yes, sir.

Q. Would you kindly look at the list with respect to Number 3 lower hold? A. Yes.

Q. What cargo according to the hatch list was stowed in Number 3 lower hold on Voyage 55 southbound?

A. Canned salmon, halves of herring,—salmon and herring is all there was.

Q. Just salmon and herring?

A. In the lower holds, yes.

Q. Mr. Hanson, from your experience and your observation, what is your opinion as to whether or not cases of canned salmon have any quality of generating any heat or causing any heat?

A. They won't cause any heat that I know of.

Q. Will you turn to lower hold number 4 on Exhibit A-2 and tell us what cargo was stowed in Number 4 lower hold?

A. Salmon and herring.

Q. Was there anything else? [326]

A. No, sir.

(Testimony of Emanuel Hanson.)

Q. Would your answer be the same as to whether or not any canned salmon would cause any heat of any kind? A. Yes.

Q. In your opinion, is Number 3 lower hold first a fit and proper place for the Denali in September or August, 1946, for the stowage and carriage of salt herring in barrels? A. Yes, sir.

Q. Would your answer be the same as to Number 4 lower hold? A. Yes, sir.

Mr. Wakefield: You may inquire.

The Court: Do you find any cargo stowed in either one of those holds or on any deck at either one of those hatches, 3 or 4, which, in your opinion, could account for the increase and elevation of the temperature in the lower holds of each one of those hatches; is there any cargo anywhere on any deck at either one of those hatches 3 or 4 which could contribute to the elevating of temperature in that lower hold?

The Witness: No, sir. In the 'tween decks there was 35 tons of personal baggage,—trunks and so forth. [327]

The Court: Would that generate any heat in the ship as a Ship's cargo?

The Witness: No, sir. And then frozen fish.

The Court: Frozen fish. Where was that stowed?

The Witness: In Number 3 'tween decks, Box Number 8.

The Court: Was that in a compartment?

The Witness: In a compartment by itself, yes.

(Testimony of Emanuel Hanson.)

The Court: Was it iced inside of that?

The Witness: No, it was frozen,—cold storage.

The Court: Is that box a cold storage box?

The Witness: Yes.

The Court: A refrigerator?

The Witness: Yes.

The Court: And this pre-frozen fish was put in there to preserve its frozen condition, is that right?

The Witness: Yes.

The Court: Would that or would that not cause any elevation of temperature in the ship?

The Witness: No.

The Court: Would it not have a tendency to lessen the temperature? [328]

The Witness: To lessen, if any, yes.

The Court: Is there any other group of cargo at each and all of the decks of those hatches 3 and 4; see if you can find any cargo that would tend to elevate the temperature?

The Witness: Number 4 hasn't any 'tween decks; that is used as steerage.

The Court: Persons stayed there while in transit?

The Witness: While in transit, yes—passengers.

The Court: You may proceed and make any other comment as to the use of any other space.

The Witness: That was passengers in Number 3 and 4 'tween decks. They go on when the ship is ready to sail and go off at the end of the voyage.

(Testimony of Emanuel Hanson.)

Q. (By Mr. Wakefield): In reference to Number 2 and 3 'tween decks, are there not stewards' supplies and other such things kept there?

A. There is an enclosed place for stewards' flour and groceries on the starboard side and there is a United States Mail locker on the port side.

Q. This is in the 'tween decks? [329]

A. In the 'tween decks, yes,—steel.

The Court: They were in steel compartments, do you mean?

The Witness: Steel compartments, yes.

Mr. Wakefield: I think that is all.

The Court: You may examine.

Cross-Examination

By Mr. Hamlin:

Q. These answers you have given to the court's questions applied, did they, to the voyage 55 south-bound for which you hold the stowage plan now?

A. Yes.

The Court: Is that the voyage on which this soft herring here in question was brought from where it was shipped?

The Witness: Voyage 55.

The Court: Is the answer to the Court's question yes or no?

The Witness: Yes.

Q. (By Mr. Hamlin): Mr. Hanson, you have mentioned a refrigeration box in Number 3 'tween decks. What kind of a motor or other device is used to furnish [330] the cooling coils?

A. It is lead from the engine room along the ship's side there in the 'tween decks.

(Testimony of Emanuel Hanson.)

Q. The apparatus is down in the engine room, is it? A. Yes, sir.

Q. Are there copper tubes running from the apparatus?

A. Tubes of some kind,—I wouldn't say what they are—tubes from the engine room.

Q. You are quite sure there is no electrically-operated unit outside of the box? A. No.

Mr. Hamlin: No further questions.

Mr. Wakefield: That is all, Mr. Hanson. Thank you.

The Court: Step down.

(Witness excused.)

The Court: Call the Respondent's next witness.

Mr. Wakefield: Call Mr. Damalin, please. [331]

JAMES ALBERT DAMALIN,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your name, Mr. Damalin?

A. James Albert Damalin.

Q. Mr. Damalin, what is your occupation, sir?

A. Foreman.

Q. Of what?

A. Alaska Terminal Stevedoring Company.

Q. How long have you been engaged in that work? A. Well, about seven years.

(Testimony of James A. Damalin.)

Q. Prior to that time, what business or occupation did you follow? A. Longshoreman.

Q. How long prior to becoming a foreman, were you a longshoreman? A. Well, since 1910.

Q. Have you been here in Seattle during all that time? A. Yes.

Q. How long, Mr. Damalin, have you worked on the Alaska [332] Steamship Company boats?

A. Do you mean as a longshoreman?

Q. Yes.

A. I would say about fifteen or eighteen years.

Q. What is your job as foreman; what does that mean; what do you do?

A. This particular day, I was a hatch boss. My duties that day were to take charge of the men and see that the proper cargo was sent out, and see that it was handled properly.

Q. Is that generally what you do as foreman?

A. As a hatch foreman, yes.

Q. When you do that work, do you go into the hatch?

A. Well, on that job, you are in the hatch all of the time.

Q. Have you been in the holds of the Denali, on many occasions? A. Yes.

Q. Are you familiar with the number 3 and number 4 lower holds on the Denali? A. Yes.

Q. Are you familiar with those two holds as they were in August and September, 1946?

A. Yes.

(Testimony of James A. Damalin.)

Q. Did you act as foreman, on the discharge of herring [333] from number 4 lower hold on September 25, 1946? A. Yes.

Mr. Wakefield: I request the bailiff to have this paper entitled, "Hatch Book" marked for identification.

(Hatch book marked as Respondent's Exhibit A-8, for identification.)

Q. (By Mr. Wakefield): Handing you what has been marked as Respondent's Exhibit A-8, will you tell us what that is?

A. Well, that is the operation that the gang went through that day.

Q. What day? A. That was 9-25-26.

Q. September 25, 1946?

A. September 25, 1946.

Q. Does that exhibit bear your signature?

A. Yes.

Q. Is that the type of report or record that you make on the discharging of the different hatches?

A. Yes.

Q. Referring to Exhibit A-8, does it show that any salt herring was discharged?

A. Yes. We discharged herring that day. [334]

Q. From what hold?

A. No. 4, lower hold.

Q. How much herring, if you can tell us?

A. How much we discharged?

Q. Yes.

A. There was 110 quarter-barrels, and 277 half-barrels.

(Testimony of James A. Damalin.)

Q. At what time of day was that brought out of the ship?

A. That was from 1:45 o'clock to 3:45.

Q. Mr. Damalin, referring to Exhibit A-8, what other cargo besides the herring was discharged from Number 4 lower hold? A. Canned salmon.

Q. Was there anything else?

A. That was all.

Q. Was there anything else in Number 4 lower hold? A. Not when I went down.

Q. Did you observe the general condition of Number 4 lower hold with respect to the stowage of the herring and the salmon?

A. Well, it was well stowed.

Q. It was well stowed? A. Yes.

Q. In what portion of the Number 4 lower hold was the herring stowed? [335]

A. Between the shaft alleys.

Q. Can you tell us from your recollection, was this date September 25th, 1946,—was that the first day that any ships worked after the termination of the strike? A. I am quite sure it was.

Q. Have you been in Number 3 lower hold on the Denali on other occasions? A. Yes.

Q. Have you been in that hold for discharging barrels of salt herring?

A. Yes, I had.

Q. What, in your opinion, Mr. Damalin, based on your experience and your observation from being in these holds over the period of time you have described as having acted as stevedore, would

(Testimony of James A. Damalin.)

you say of Number 3 lower hold in the summer-time as to whether or not it was a warm or a hot cold or whether it was cool?

A. I have always found it cool.

Q. Is Number 3 lower hold below the water line? A. Yes.

Q. What would you say with respect to Number 4 lower hold with the same conditions as Number 3? A. I would say about the same.

Q. What function do you perform on loading the vessel northbound when the vessel leaves Seattle for Alaska; [336] do you do any of that?

A. Yes.

Q. What work do you perform in connection with loading the vessel?

A. Well, it would be the same; you are down in the hatch and you put the stuff away properly.

Q. Do you determine where to put it?

A. Well, as a rule the ship foreman tells you where he wants it and then you put it there.

Q. Do you mean Mr. Hanson?

A. Well, whoever has got charge of the ship.

Q. But you actually direct the place where the cargo is put? A. That is right.

Q. Direct the longshoremen where to put it?

A. That is right.

Q. In your opinion, would such cargo as citrus fruits and eggs and lard and tomatoes, onions, potatoes,—would those cargoes be in your opinion subject to damage by any amount of heat?

A. No.

(Testimony of James A. Damalin.)

Q. I say would they be damaged by heat?

A. Oh, yes.

Q. And would you say that the character of those cargoes I have enumerated is similar to salt herring with [337] respect to heat damage?

A. Do you mean whether the heat would damage them?

Q. Yes. A. I would say that it would.

Mr. Hamlin: If the Court please, I don't think this witness has been qualified to testify as to the chemical action caused by heat to such cargo.

The Court: I will sustain the objection with leave to qualify the witness.

Q. (By Mr. Wakefield): Mr. Damalin, in your opinion, and with regard to Number 3 lower hold, is it proper to stow those items which I have enumerated in number 3 lower hold?

A. I would say yes.

Mr. Hamlin: That is objected to. It is merely another way of getting at the same thing.

The Court: I believe in view of what the witness has said as to his experience that the question is proper and the objection is overruled.

Q. (By Mr. Wakefield): In actual practice in respect to August and September, 1946, did you stow such cargoes in Number 3 lower hold? [338]

A. Yes.

Mr. Hamlin: That is the same type of question to which an objection was sustained yesterday. I don't think it is at all material. It is not any-

(Testimony of James A. Damalin.)

thing that tends to prove the defense of the carrier. It is not pleaded. It is not material.

The Court: I am going to sustain this objection subject to the same condition which I stated yesterday. If counsel on showing the court authority which the court feels controls, and I will add today persuades this court to a different conclusion, I will be the first to change my position upon it and to indicate a willingness to do so, if I am reminded of the authorities which justify it.

The objection is sustained.

Q. (By Mr. Wakefield): Mr. Damalin, from your experience in handling cargoes aboard vessels and particularly the Denali, is there any characteristic of canned salmon in cartons or otherwise which generates or causes any heat of any kind?

A. No.

Q. In connection with Number 3 lower hold, what has been your experience in going into that hold as to whether or not in the summertime the Number 3 lower hold will [339] be warmer or cooler than the outside atmosphere?

A. Why, it is cooler.

Q. Is the same thing true of Number 4 lower hold?

A. Yes.

Q. You are actually down in the hold, are you, while these cargo operations are going on?

A. All of the time.

Q. Do you stay down there all of the time?

A. All of the time.

(Testimony of James A. Damalin.)

Q. In discharging Number 3 lower hold, have you had any experience as to the shaft alleys; what can you tell us about the shaft alleys as to whether you have ever found them warm or whether they are cool?

A. Well, now, when they are loading down there I usually stay on the shaft alley.

Q. Do you mean you stand on the shaft alley?

A. Yes; because it is quite a climb to get from one to the other; and I have never found them warm yet.

Mr. Wakefield: I offer Respondent's Exhibit A-8 in evidence.

Mr. Hamlin: No objection.

The Court: That is admitted.

(Respondent's Exhibit A-8 received in evidence.) [340]

Mr. Wakefield: No further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Hamlin:

Q. Mr. Damalin, referring to Number 4 lower hold on the Denali, which you superintended unloading on September 5, 1946, I ask you whether or not the barrels of salt herring belonging to Apex Fish Company, which were stowed in the lower hold were over-stowed with any other material?

A. Well, there was a little bit of salmon on top of it.

(Testimony of James A. Damalin.)

Q. How was that on top; was there dunnage on top of the kegs? A. Yes.

Q. How many tiers of canned salmon were on top of the barrels?

A. It wasn't over five or six at the most.

Q. Five or six tiers high?

A. Just in the square, yes.

Q. How far did those extend over the top of the herring; did they extend from each shaft alley?

A. Just about.

Q. Was any piled over the top of the shaft alley and [341] extending out into the wings?

A. No; there was salmon in the wings but not on top. This we took out was just even with the shaft alley.

Q. About how high are those shaft alleys from the top of the deck?

A. I would say between six and a half and seven feet.

Q. These times you mentioned when you were standing on the top of the shaft alleys, you were wearing shoes, of course? A. Yes.

Q. Was this shortly after the ship had been in operation; that is, moving in the water, or had she laid dead at the pier for some time when you mentioned standing on top of the shaft alleys?

A. Well, I have been down there a good many times.

Q. Have you ever been there right at the conclusion of a voyage?

(Testimony of James A. Damalin.)

A. Well, I don't know about that. I have been down there as quick as she comes in on lots of times when we start discharging down there.

Q. Do you recall standing on the top of the shaft alleys immediately after the end of a voyage?

A. I have at different times, yes.

Q. You didn't feel any warmth on those occasions? [342]

A. Not any more so than normal.

Q. How do you get up on top of the shaft alleys?

A. There is a ladder that goes around both ends.

Q. That goes directly to the center of the top, doesn't it?

A. There is a ladder that comes down the 'tween deck and then you get down from there to the shaft alley. If you have to get to either side—either wing—then you naturally have got to climb up and down the other side again.

Q. Do you know where those steam pipes pass through the shaft alleys? A. No, I don't.

Q. When you stand on the shaft alleys you are of necessity on top of them, are you not?

A. Yes.

Q. They are a curved surface on top?

A. Yes.

Q. So that there is only one place where you can stand and that is at the top of the arc which the top forms, is that not true?

A. That is right.

(Testimony of James A. Damalin.)

Q. Where does the ladder go down,—on the in-board side or the outboard side of the shaft alley?

A. Do you mean from the 'tween deck? [343]

Q. No. When you are on top of a shaft alley and you want to get down to the deck.

A. Well, it comes all the way around on both sides.

Q. I don't think I understand you. These two shaft alleys are humps that run parallel fore and aft on the ship, isn't that true?

A. That is right.

Q. It is possible to get from the top of the shaft alleys down into,—under the floor of the hold, either between the shaft alleys or on the wing side. Does the ladder go down to both sides, is that what you mean to say? A. Yes.

Q. If you are on the other side of it you have to get between the shaft alleys.

Mr. Hamlin: That is all.

Mr. Wakefield: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call the Respondent's next witness.

Mr. Wakefield: If the Court please, before proceeding with further witnesses I would like [344]—if it is agreeable to the Court—at this time to file a memorandum which I prepared. I hope I wasn't too sleepy to be coherent. I would like to file it and serve counsel with a copy and address my remarks to the matter.

The Court: You would like the Court to become familiar with the matter so as to be in an at-

titude of mind to best receive your arguments, would you not?

Mr. Wakefield: Yes, your Honor.

The Court: Has counsel for the libelant changed his position?

Mr. Hamlin: No, Your Honor, I feel even more strongly on it.

The Court: I assume counsel for the respondent has not changed his position.

Mr. Wakefield: No, indeed. I likewise feel more strongly about my position.

The Court: I would like counsel to give me the citation of the case—if there is any such—or cases which you think control this court's action on these questions, particularly this one question which was prominently emphasized yesterday afternoon. Then during the noon hour I would like to consider these things. [345]

I will hear the argument this afternoon.

Mr. Wakefield: The memorandum I have filed does contain cases cited there.

The principal one, I think, is the Ramgoon Marue by the Second Circuit.

The Court: Where is that cited?

Mr. Wakefield: On page 4, Your Honor.

The Court: Page 4, near the top of the first third.

(Discussion between the court and counsel re authorities.)

The Court: Court will be at recess until 2:30 this afternoon.

(At 12:00 o'clock, noon, Thursday, July 15th, 1948, proceedings recessed until 2:30 p.m., in the United States Court House.] [346]

Seattle, Washington

July 15, 1948, 2:30 o'Clock P.M.

(All parties present as before.)

The Court: Mr. Wakefield, when you are ready you may proceed now.

(Argument by Counsel to the Court Re Admissibility of Evidence.)

The Court: What the Court yesterday said and ruled respecting prior shipments on specific voyages will stand.

The Court is of the opinion and rules, and confirms the ruling made yesterday, that evidence of particular voyages and the results thereof may not be introduced.

The Court now is of the opinion, however, that it is competent and permissible for respondent to ask an expert witness of proven qualification whether or not the stowage in this instance was in accordance with the standards of good stowage ordinarily [347] practiced in the trade.

If I said anything or ruled as to a particular question and answer yesterday in a manner inconsistent with this present opinion upon that matter, what the Court said yesterday is amended accordingly. In other words, it is competent for Counsel to ask a qualified expert witness if the

stowage in this case here in question was in accordance with the accepted standards of good stowage.

You can again look over the questions and answers in this connection and see if the court yesterday excluded that when to have done so was in conflict with the court's present opinion just now expressed. If so, I will permit you to go into that again.

Mr. Wakefield: If the Court please, for the record the respondent requests an exception to that portion of the ruling which excludes the testimony of what carrying the same commodity on other voyages would show.

The Court: Allowed.

Mr. Wakefield: May I at this time resume the reading of the deposition?

The Court: Yes.

Mr. Wakefield: I believe, Your Honor, that [348] beginning on page 17 of the deposition—

The Court: I have before me page 17 of the deposition of Arne Burns. Is that the former Chief Officer?

Mr. Wakefield: That is, Your Honor.

The Court: I am looking at line 17. Do you wish me to look at some other line?

Mr. Wakefield: I was going to say that the objection was made to the question on Line 9.

The Court: Line 9. Do you wish to propound that question and read the answer?

Mr. Wakefield: Yes. I am not certain whether that falls within the prohibition of Your Honor.

The Court: I am going to allow that question and answer to be read.

As to custom, I am inclined to think it falls within the expression of the Court's last expressed opinion. You may read it.

Mr. Hamlin: May the record show an exception on the part of Libellant?

The Court: Allowed.

“Q. (By Mr. Wakefield): Would you say it [349] was customary to carry barrels of herring in Number 3 and Number 4 lower holds on the Denali? A. Yes.”

Mr. Wakefield: Exhibit A-5 has been marked and identified.

I have offered it in evidence and Your Honor reserved ruling on that. I take it that it would not be admissible under the Court's ruling.

The Court: I wish you would renew your statement as to your position on that offer.

Mr. Wakefield: If the Court pleases, the exhibit Respondent's A-5 which is now offered pertains to Voyage 54 of the Denali which has been testified to already as having been the immediately preceding voyage of the vessel not more than 30 days prior to the voyage in question in this suit.

This exhibit is the hatch list which shows 924 half-barrels of salt herring from Port Wakefield, belonging to the same libellant, stowed in Number 3 lower hold between the shaft alleys,—it is lower hold, center.

The exhibit also shows with respect to the balance of the cargo in that hold that it consisted of frozen

halibut and cans of salmon, the same as in [350] our present case.

The frozen halibut, of course, was in the Number 3 'tween deck and it is so indicated. The lower hold of Number 3 on this exhibit had already the same amount of herring as a matter of fact,—924 half-barrels as against 971 in the case on trial.

It is my contention that this exhibit shows the carriage of that herring in the summertime in the same place in the same quantity and with the same kind of other cargo, namely, canned salmon.

I would say to Your Honor that we are prepared to prove, if this exhibit is admitted, that there was no damage or claim resulted from this shipment on Voyage 54. It is offered also to show proper stowage and customary stowage of that commodity in that same space.

Mr. Hamlin: The offer of this exhibit is objected by the libelant on the ground that it is not material, that it is not within any of the issues of the case and that it is in contravention of the Court's ruling just made upon the argument of counsel upon this entire question. It is also my recollection that this exhibit was offered, argued and refused yesterday. [351]

The Court: The Court feels it comes within the ruling of the court as to particular shipments announced a few months ago and announced yesterday. Therefore, the Court applies the same ruling to this exhibit and sustains the objection to it and declines to receive the same in evidence. I feel that it would be practically impossible on shipments be-

tween here and Alaska to establish like conditions on each voyage or on other voyages with any comparison to the conditions which were prevailing and affecting the shipment in question in this litigation.

Mr. Wakefield: In view of the Court's ruling with respect to Respondent's Exhibit A-5, I believe that the questions following on the balance of page 17 and page 18 and down to line 11 on page 19 may be omitted as they all pertain to that specific shipment on Voyage 54.

The Court: Will you indicate where you wish Counsel reading the questions to commence reading again?

Mr. Wakefield: On page 19, line 11.

The Court: You may proceed.

“Q. (Mr. Wakefield, reading): Mr. Burns, what can you tell us with respect [352] to other perishable cargoes carried in Number 3 or Number 4 lower holds?”

Mr. Hamlin: To which the libelant objects as likewise not material. If it is improper to show specific shipments on previous voyages, it is even more immaterial on identical voyages such as those in suit herein.

The Court: I do not think it is proper to go into that over objection. The objection is sustained.

Mr. Wakefield: Well, if the Court please, in view of that ruling, I would like to make for the record an offer of proof by this witness with respect to both matters.

(Deposition of Arne Burns.)

The Court: You may do that.

Mr. Wakefield: First, with respect to Respondent's offered Exhibit A-5 which was rejected, to prove that on the voyage immediately preceding the one in question in this suit not more than thirty days prior thereto that the Denali loaded and successfully carried in Number 3 lower hold 924 half-barrels of herring from Port Wakefield to Seattle, being the same place from where the cargo in question was loaded and that it is customary on the [353] Denali to carry herring in Number 3 and Number 4 lower holds.

The respondent further offers to prove by this witness that it is customary and proper and frequently done to carry perishables in Number 3 and Number 4 lower holds on the northbound voyage from Seattle to Alaskan ports and that such perishables consist of such commodities as fresh apples, lemons, oranges, bananas, potatoes and onions, butter, eggs, and shortening or lard.

Mr. Hamlin: To which the libelant makes the same objection as was addressed to the specific question.

The Court: The objections are sustained. The Court rejects the offer of proof.

Now I take it you might appropriately skip to line 5 on page 20.

Mr. Wakefield: Yes, Your Honor. I was going to suggest that.

Commencing on line 5, page 20, Your Honor:

"Q. On Voyage Number 55, from Port Wakefield to Seattle, between August 23rd and Septem-

(Deposition of Arne Burns.)

ber 4th, 1946, did anything unusual happen aboard the ship which would in any way account [354] for any heat or other adverse conditions in either Number 3 or Number 4 lower holds?

“A. No. Everything was normal operation.”

Mr. Wakefield: I think now, Your Honor, we can skip to Line 23 on the same page.

The Court: That would seem appropriate to me.

Mr. Wakefield (Reading):

“Q. At the time you loaded the barrels of herring at Port Wakefield in Number 3 and Number 4 lower holds, was Mr. Wakefield present during the loading? A. Yes.

“Q. You know him, do you? A. Yes.

“Q. And he saw where this cargo was being stowed? A. Yes.

“Q. Did he at any time make any comment or objection to that stowage?

“A. Not that I remember.

“Q. Mr. Burns, in your opinion, and based upon your experience with herring and the carriage of it, I will ask you whether you believe that [355] Number 3 and Number 4 lower holds were proper place to stow the barrels of herring? A. Yes.

“Q. On this voyage Number 55, will you tell us when the Denali arrived in Seattle? You can refer to the log book, if you do not remember.

“A. Yes.

“Q. I mean arrived at Bell Street Terminal, which was the destination of this Port Wakefield cargo, as shown on Respondent's Exhibit A-2?

(Deposition of Arne Burns.)

“A. At eighteen forty fast at Bell Street. It does not give the date.

“Q. I noticed that, but I call your attention to the preceding date. What is the preceding date?

“A. It is September 3rd.

“Q. So it is correct to say, in view of the notation in the log book, that that date would be the 4th? A. It appears so, yes.

“Q. It would appear to be September 4th?

“A. Yes, sir.

“Q. And eighteen forty is 6:40 p.m., is it not?

“A. Yes.

“Q. After arrival at Bell Street Terminal at 6:40 p.m., on the 4th of September, 1946, did you [356] remain aboard the ship or did you leave the ship as a result of a general strike?

“A. We left the ship on account of the strike.

“Q. When did the strike begin?

“A. To my recollection, we left the following day.

“Q. That would be what date?

“A. That would be September 5th.

“Q. And at the time you left the ship, Mr. Burns, as a result of the strike, did everybody leave, or just some of the crew?

“A. Everybody.

“Q. Do you know whether or not the ship was picketed after that, or at that time? A. Yes.

“Q. Here in Seattle, and at the Bell Street Terminal? A. Yes.

“Q. Do you have charge of the discharging of the ship, or is that done by somebody else?

(Deposition of Arne Burns.)

“A. That is done by the stevedore foreman.

“Q. So you do not actually know about the discharge of this herring, or other cargo, from the Denali? A. No.

“Q. Did you go back on the Denali after the strike? A. No. [357]

“Q. Can you tell us from your own recollection about how long the strike lasted on this occasion?

“A. I believe the strike was over about December 20th. I was in Portland before the strike was over.”

The Court: Is that statement necessary?

Mr. Wakefield: No, Your Honor.

(Court and counsel referring to statement in deposition offering exhibits in evidence.)

The Court: Go to the place where you feel you pick up the material part of the record.

Mr. Wakefield: I believe the cross-examination is next, Your Honor.

The Court: Will someone read the first question?

“Cross-Examination

“By Mr. Hamlin:

“Q. Mr. Burns, before you left the ship on account of the strike at Seattle, on the 5th of September, 1946, had any portion of this Port Wakefield shipment of salt herring been discharged [358] from the Denali?

“A. The ship was tied up at 6:40 p.m., and we left the ship. We had to leave the ship. We only worked until 5:00 p.m., and then the relief mate

(Deposition of Arne Burns.)

came on, and I left at 5:00 p.m. So I wasn't there when any discharge operation was handled.

“Q. Do you mean by that that so far as you know, you do not know whether any of it was discharged or not? Is that what you are trying to say?

“A. As I recollect now, I will not state definitely what day we got off, whether it was the 5th or the 6th. I do not recollect. I remember that the following day I was out on the dock, and there was some herring that was already discharged. If we got off the ship the 5th or 6th, it must have been the 6th, because I remember being out there and seeing it. So it must have been the 6th that we got off.

“Q. Your duties, including superintendence over the discharging of the cargo, ended at Seattle, did they not? A. No.

“Q. That is not part of your work?

“A. No; that is not part of my duties. [359]

“Q. Did you have occasion to inspect any of those barrels that you saw on the dock, that you mentioned a minute ago?

“A. I happened to be out there on the dock, and I went over there, and I saw some barrels was half opened. They were inspecting some of the barrels then.

“Q. Were they some of this Port Wakefield shipment, from Number 3 and Number 4 lower center holds? A. Yes.

“Q. Were you able to observe anything about the condition of the contents?

“A. No, I merely looked as I walked by.

(Deposition of Arne Burns.)

“Q. Did you ever learn directly whether or not any of that shipment was in damaged condition when it was discharged?

“A. Pardon me——

“Q. Did you ever learn directly that any portion of that Port Wakefield shipment was in damaged condition when it was discharged? A. No.

“Q. Can you recall about how many barrels you saw on the dock that had been discharged before you left the ship on account of the strike?

“A. No. [360]

“Q. Taking you back to the day you left Port Wakefield—I think that was August 24th, wasn’t it?

“Mr. Wakefield: August 28th.”

Mr. Wakefield: It was the 24th, Your Honor.

“Q. (Continuing): Where was your next stop after leaving Port Wakefield? A. Port Vita.

“Q. What kind of an operation is carried on at Port Vita?

“A. We were discharging cargo and loading cargo.

“Q. I mean is it another herring plant?

“A. It is another herring plant.

“Q. What did you pick up there?

“A. Herring.

“Q. Was it salt herring, in barrels?

“A. Yes.

“Q. Was any portion of the Port Vita shipment on the dock when you arrived?

“Q. Yes.

“A. In Port Vita?

(Deposition of Arne Burns.)

“A. I do not recollect. I do not remember. I believe so, but I do not remember for sure. I [361] believe it was; yes.

“Q. Do you remember about how many barrels you picked up there?

“A. I will have to look at the cargo plan.

“Q. Will you look at the cargo plan, please?

“A. (Witness examines cargo plan.) It was over one thousand barrels.

“Q. Based on your experience in this trade, I will ask you whether or not it is customary for the herring plants to place as many barrels as they can on the dock shortly before the vessel arrives?

“A. I believe the reason they put them out on the dock is on account of shortage in the warehouse, shortage of space in the warehouse.

“Q. Have you ever seen it done when the warehouse was partially empty?

“A. No. I am not familiar with their operation. Just what they do, I do not know.

“Q. Is it not true that this is done as a custom by the herring operators up there, in order to facilitate loading, and not detaining the ship any longer than necessary?

“A. No. I do not believe that is the reason. I believe the reason is that the warehouse is [362] full, and they have no other vacant space, and in order to keep on operating they will have to stow them on the dock. That is my understanding that I have had from my previous experience up there.

“Q. Did you inspect the warehouse at Port

(Deposition of Arne Burns.)

Wakefield when you arrived on the 23rd of August, 1946, and ascertain whether or not their warehouse was at that time full to capacity?

“A. No.

“Q. Generally, was the weather the same at Port Vita the day you arrived there as it was at Port Wakefield, that you had left shortly before?

“A. Yes. We had immediately arrived at Port Vita. The weather must have been the same; yes.

“Q. What is the running time between those two places?

“A. They are right together; about a couple of miles.

“Q. Number 3 and Number 4 holds are forward of the house on the ship, are they not?

“A. The after part.

“Q. They are aft? A. Yes. [363]

“Q. Which way is the compartment for the crew?

“A. The Crew Department is forward. That is, the Deck Department. The Steward's Department is aft.

“Q. That is where the Stewards live?

“A. The Stewards' Department, yes.

“Q. Are those quarters heated?

“A. Yes, I believe so. I assume so.

“Q. How are they heated?

“A. I don't know. I don't remember.

“Q. To refresh your recollection, are they heated by steam?

“A. Well, I don't remember. It is possible, but I do not remember.

(Deposition of Arne Burns.)

“Q. Do you remember of any steam pipes which passed through the shaft alley and back in the general direction of those quarters, on the Denali?

“A. I don’t know.

“Q. Have you ever had occasion to enter either of the shaft alleys of the Denali?

“A. I don’t remember if I have. I don’t remember that I did.

“Q. You do not know what is inside them?

“A. No; I don’t know. [364]

“Q. Do you know how thick the steel housing is covering the shaft alley?

“A. Outside, one-half inch, or three-eighths inch, or one-half inch.

“Q. Is there insulation over the shaft alley?

“A. No; not there.

“Q. How long have you sailed, Mr. Burns?

“A. Altogether?

“Q. Yes. A. Twenty-two years.

“Q. Can you state whether or not it is usually warm inside the shaft alley?

“A. No. I have been in shaft alleys on other ships, but I haven’t noticed any warmness.

“Q. You never noticed any warmness?

“A. No.

“Q. Was any record kept of temperatures in Number 3 and Number 4 lower holds, on Voyage Number 55, after leaving Port Wakefield, and before arriving at Seattle? A. No.

“Q. I believe you stated that you entered these holds periodically as loading operations were com-

(Deposition of Arne Burns.)

pleted, on your trip from Port Wakefield down to Seattle; is that correct? [365]

“A. No. Just during loading operations,—just during loading and discharging operations.

“Q. Referring to the log book, will you tell us how many such loading operations occurred, and the date of each, between Port Wakefield and Seattle? A. In those particular holds?

“Q. Yes. And I am referring to what has been marked as Respondent's Exhibit A-1, the log book.

“A. I cannot say from this book. You see, on the ship when we have to work cargo we have special books. This book here is just pertaining to the running of the ship, the time you arrive and the time you leave. This book does not give that.

“Q. Can you do that by comparing your log book, marked Respondent's Exhibit A-1, with what has been marked as Respondent's Exhibit A-3, the cargo stowage plan?—or perhaps Respondent's Exhibit A-2, the hatch plan?

“A. (Witness examines exhibits.)

Hatch Number 3, at Moser Bay—it doesn't give the date on this one.

“Q. Does your log book show when you stopped [366] at Moser Bay?

“A. On August 28th. Shearwater Bay, August 27th. That is all in Number 3.

“Q. How about Number 4?

“A. Port Bailey, August 24th and 25th. That is all for Number 4.

“Q. So that from August 25th to the date of your arrival in Seattle, at 6:40 p.m., on September

(Deposition of Arne Burns.)

4th, you did not enter Number 4 lower hold, is that correct? A. That is correct; yes.

“Q. From August 28th, leaving Moser Bay, until your arrival in Seattle on September 4th, you did not enter Number 3 lower hold, is that correct? A. That is correct.

“Q. When these barrels were stowed at Number 3 and Number 4 lower holds, at Port Wakefield, on Voyage Number 55, do you recall whether or not thereafter they were ever over-stowed with any other material?

“A. In Number 3 they were clear, I know. In Number 4, I do not recollect. And I cannot quite see on the cargo plan if there was salmon on top or not. It is not quite clearly given, the picture [367] here on that.

“Q. There were cartons of canned salmon in Number 4?

“A. Yes. I do not recollect now whether there was salmon on top or not.

“Q. Where else would you put it in Number 4? Is there any other place?

“A. Well, you have the two wings.

“Q. Over the housing, you mean?

“A. Over the side of the housing, in the two wings, outside.

“Q. Does your cargo stowage plan indicate what was down in the wings? A. Salmon.

“Q. Exhibit A-3 shows salmon in the wings, is that correct? A. Yes.

“Mr. Wakefield: Which hold are you talking about?

(Deposition of Arne Burns.)

“Mr. Hamlin: I am talking about Number 4.

“Q. (By Mr. Hamlin): What does it show in the center? A. It shows herring.

“Q. Nothing else?

“A. That is all it shows on the cargo plan; yes.

“Q. Where was that salmon taken on which is shown [368] on Respondent's Exhibit A-3, the cargo stowage plan? A. Pier 24.

“Q. That was taken on at Pier 24?

“A. No. It was taken on at Port Bailey.

“Q. And that is a stop between Seattle and Port Wakefield, is it not? A. Yes.

“Q. What else was out in the wings?

“A. That is all.

“Q. Just that salmon? A. Yes.

“Mr. Wakefield: These last few questions have referred to Number 4 lower hold?

“Mr. Hamlin: Yes, sir.

“The Witness: Yes, sir.

“Q. (By Mr. Hamlin): Calling your attention to Voyage Number 54 of the Denali, which you indicated left Seward on or about July 28th, 1946, and for which you have a hatch list here marked as Respondent's Exhibit A-5, can you tell whether or not the 924 barrels of salt herring in Number 3 lower hold center were over-stowed, on Voyage Number 54, with any other material?

“A. I do not remember.” [369]

The Court: Do you wish to go into that?

Mr. Hamlin: No, I do not, Your Honor.

“Q. (By Mr. Hamlin): Would you say from your experience that over-stowing would ever have a tendency to accelerate heat damage to cargo?

(Deposition of Arne Burns.)

“A. I never have had experience to that effect.

“Q. Did you ever enter Number 3 or Number 4 lower holds after the vessel docked in Seattle, at the conclusion of Voyage Number 55? A. No.

Mr. Hamlin: I notice that these questions are predicated upon the possibility that the direct testimony was admitted in evidence.

I think we should skip from Line 9, page 34, through the balance of the page 34 down through line 8 on page 35,—commencing on line 9 on page 35.

“Q. Is there any other officer or member of the crew on the ship whose responsibility it is to see to the proper stowage of cargo?

“A. Well, I am fully responsible and in charge. Then, if it happens that I would be off [370]for a time, and I go to bed, then whatever officer is on deck is in charge, and they consult me.

“Q. On any of these questions when you entered Number 3 lower hold, after leaving Port Wakefield, such occasions being on August 27th, at Shearwater Bay, and on August 28th at Moser Bay, did you inspect these shaft alleys, or the area around the herring, to ascertain whether or not it was getting warm there?

“A. I never noticed any excess. Everything was normal, as I recollect.

“Q. Did you feel the housing of the shaft alley?

“A. Yes. I was walking out there and put my hand on it to get up on top of it. Like when you

(Deposition of Arne Burns.)

go out on top of the wing, you put your hand on it, and walk along it.

“Q. Do you recall whether it was warm or cold?

“A. It was neither ice cold nor warm.

“Q. On the occasions when you entered Number 4 lower hold, on August 24th and August 25th, at Port Bailey, did you inspect the cargo of salt herring from Port Wakefield, and the shaft alleys in the holds, to see whether or not they were warm?

“A. The same condition as Number 3.” [371]

Mr. Hamlin: I stated that I had no other questions and Mr. Wakefield replied the same.

The Court: This deposition so far as the questions and answers have been read and received in evidence is now received in evidence as a part of the Respondent's case in chief.

Mr. Wakefield: I would like to call Mr. Gow.

The Court: You may do that. Come forward and be sworn.

JAMES C. GOW,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your name, please?

A. James C. Gow.

Q. What is your occupation, Mr. Gow?

A. Marine Surveyor.

Q. You are the President of Alexander Gow, Incorporated?

(Testimony of James C. Gow.)

A. Alexander Gow, Incorporated.

Q. How long have you been engaged in the business of [372] marine surveying?

A. Twenty-six years.

Q. Has that been largely in the Port of Seattle?

A. Yes, sir.

Q. And other Puget Sound ports?

A. Yes, sir.

Q. Has your marine surveying included the surveying of ships and cargoes engaged in the Alaska trade?

A. Yes, sir.

Q. How frequently do you do work of that kind?

A. Our work in connection with that is being called in when any damage has occurred to cargo or where the operator wants an opinion on loading the cargo.

Q. In your total experience, Mr. Gow, as a marine surveyor, what would you say as to whether or not you have done more cargo damage work or more hull work or what would you say?

A. I have done I would say more cargo work.

Q. That you would say is your particular specialty.

A. Yes, sir.

Q. Are you familiar with the carriage of fish from Alaska to Seattle, including salmon, herring and other types of fish cargoes?

A. Yes, sir.

Q. Have you had occasion to survey damage to herring [373] and damage to salt salmon and canned salmon?

A. Yes, sir.

The Court: What is the most notable cargo surveying experience you have had, Mr. Gow?

(Testimony of James C. Gow.)

The Witness: What was that, sir?

The Court: What is the most notable recent cargo surveying,—damage surveying you have had?

The Witness: The most recent one was in connection with the Diamond Knot.

The Court: What, briefly, was the nature of that?

The Witness: My position in that connection was to work with the salvor to determine whether or not the cargo could be raised, and whether or not, after it has been raised, the cargo can be put in condition to return a value.

The Court: What were the salient conditions in connection with that situation in which you have worked?

The Witness: In this particular case the ship was sunk in 135 feet of water.

The Court: Where?

The Witness: Off of Point Crescent Bay, 15 miles west of Port Angeles.

The Court: In the State of Washington? [374]

The Witness: Yes, sir.

The Court: In what waters was it?

The Witness: In the Strait of Juan de Fuca.

The Court: Was it large or small?

The Witness: It was a large cargo of a value of one and one-half million dollars.

The Court: You may inquire.

Q. (By Mr. Wakefield): Mr. Gow, as to the value of the herring in this case, did you at the request of the Alaska Steamship Company inspect

(Testimony of James C. Gow.)

this cargo of herring after it was discharged in Seattle? A. Yes, sir.

Q. Can you tell us when you made your inspection?

A. I made an inspection on the morning of the 5th of September and in the afternoon of the 5th of September, and then subsequent days after that.

Q. The inspection was for what purpose?

A. The purpose was to determine its condition. There was alleged damage to the herring. When the barrels were opened up, I was there when they were opened and looked at the fish and listened to the complaints and looked at the fish itself.

Q. Was the herring all damaged?

A. The herring that I saw was damaged, yes, sir. [375]

Q. Could you tell from inspecting it what had been the cause or probable cause of the damage?

A. No. You could tell that the flesh had pulled away from the meat. The general opinion was that it had been a heated condition.

Q. Was that your opinion or did you have any other opinion as to the possible cause?

A. There are several things in my mind that can happen to herring or to any other fish. If it is properly cured and if when caught it is perfectly fresh, then a heat condition could produce the conditions that we found there. But again on the other hand, if the fish was not fresh in the first place or hadn't been properly cured, it would have given the same indication.

(Testimony of James C. Gow.)

Q. So you were not able to tell from your examination on September 5th, just what the cause of damage was? A. No, sir.

Q. Was Captain Perry down there during the time you were down there?

A. Yes, sir, I saw Captain Perry there at the time.

Q. Was Mr. Pete Wahl there?

A. Yes, sir.

Q. Mr. Gow, what, if anything, did Pete Wahl want to do with this entire shipment; what did he tell you [376] or indicate he wanted to do?

A. I questioned Mr. Wahl as to the extent of damage.

Mr. Hamlin: If Your Honor please, this sounds like hearsay.

The Court: You cannot have him state what he said to Captain Wahl or what Captain Wahl said to him, can you, without violating the hearsay rule?

Mr. Wakefield: We have his report in evidence which violates the hearsay rule, I think. This just goes to his credibility.

The Court: Is his report in evidence?

Mr. Hamlin: Mr. Wahl's report is in evidence.

The Court: Will you take that exhibit and have it before you?

You may inquire about such subject matter as is mentioned in statements in the Survey Report, if that is your survey report now in evidence. I have some doubt about whether it is in evidence.

(Testimony of James C. Gow.)

Mr. Crutcher: We have a copy, Your Honor.

The Court: What is the number that the clerk has given it as a Clerk's exhibit?

Mr. Crutcher: It is Libelant's Exhibit Number 12.

The Court: This is Peter Wahl's report. The Court has admitted that in evidence. [377]

Mr. Wakefield: The question I am propounding, Your Honor, will have to do with testing the qualifications of this witness to express an opinion. Your Honor will recall that at the time this was offered I objected on the ground that the witness was deceased and this was hearsay,—particularly so as to any opinion he might have expressed. My question to Mr. Gow, now, will bear on the question of his qualification to express an opinion on this subject.

The Court: I will hear the question.

Q. (By Mr. Wakefield): What, Mr. Gow, did Pete Wahl want to do with this shipment?

Mr. Hamlin: That is objected to on the ground that it is a violation of the hearsay rule. It is hearsay by conduct and it necessarily requires that this witness repeat a hearsay statement made to him by Mr. Wahl. That is not in the same class as a report of Mr. Wahl, and it is not a question having to do with any statement contained in Mr. Wahl's report which was admitted in evidence by the court under an exception to the hearsay rule permitting the receipt in evidence of memoranda made by an agent of a person party to the present

(Testimony of James C. Gow.)

litigation in the [378] ordinary course of business. That was the ground for Exhibit 12.

There is no exception permitting this witness to quote a hearsay statement made by Mr. Wahl or any other person in this kind of a situation.

The Court: Did you wish to make a statement for the record?

Mr. Wakefield: Yes, Your Honor. I think where I am deprived of the right of cross-examining the witness I certainly ought to be able to impeach his credibility or rather his ability or his qualification to express an opinion. I could certainly do so if he were here.

The Court: In connection with that matter, you can ask him what, if anything, Peter Wahl said about his own qualifications. If you seek to show some statement made by Wahl that related to the question and has a direct bearing on Peter Wahl's qualifications, which you question and have already questioned in the record as the basis for admitting an exhibit.

Mr. Wakefield: Maybe I could assist the court and counsel by stating that Mr. Gow's testimony will be that Pete Wahl wanted to dump the whole shipment in the Bay and it was only over Mr. Gow's [379] objections that the shipment was not dumped and as a result they realized \$10,000 salvage. I think that is highly material to raise a question as to Pete Wahl's qualification to express an opinion.

(Testimony of James C. Gow.)

The Court: What did Peter Wahl say in that Libellant's Exhibit 12 which bears upon the subject of whether or not Peter Wahl did want to dump them in the bay? Is there anything said in that exhibit which is inconsistent with his wanting to dump them into the bay?

Mr. Wakefield: He says, first:

"Upon inspection we found the herring showed signs of heat and immediately investigated further," and so forth.

Then, in the last paragraph he says, "The entire lot put in storage put in storage shows evidence of having been stowed in a warm place, some showing it more markedly than others."

The Court: He may have wanted to dump it all in the bay and he may or may not have been unwise in wanting to do that. But still even if he wanted to do that, he may still be qualified to make an inspection.

The objection is sustained. [380]

Q. (By Mr. Wakefield): Mr. Gow, after you had inspected some of the barrels on September 5th, was any further inspection made of all of the shipment?

A. Yes. The barrels were opened up. They were in tiers along one end of the shed and along the side. Mr. Wahl and myself went over them and he took out fish for my inspection. I asked him if he would bring up fish from the center of the barrels as well as from the sides of the barrels.

(Testimony of James C. Gow.)

He pointed out to me why the fish was considered spoiled.

Q. Did he consider that all of it was spoiled or did you all agree that there was some salvage available?

A. In the first remark Mr. Wahl made he said it. I asked him——

Mr. Hamlin: That is objected to as calling for hearsay.

The Court: Is there any reason why the hearsay rule doesn't apply to exclude this?

Mr. Wakefield: I think it would except for the exhibit.

The Court: What is there in the exhibit that you are now asking this witness concerning?

Mr. Wakefield: I am referring to Exhibit 12 which is in evidence.

The Court: What statement in there makes this [381] question admissible?

Mr. Wakefield: I don't quite understand.

The Court: Is there some statement made in the exhibit which you seek by this question to contradict?

Mr. Wakefield: I don't know what the witness is going to say. He started to say, "Wahl said."

The Court: Well, you should know what your purpose is in asking this question.

Mr. Wakefield: My purpose is to show the general plan or arrangement which was made between these people for the reconditioning or the inspection of this.

(Testimony of James C. Gow.)

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: I don't see how you could tell what was in his mind. The last part of the question "Agree"—as to that part of it the question may be propounded.

Mr. Wakefield: Perhaps I can—

The Court: Redraft the question.

Mr. Wakefield: May I change the question, your Honor?

The Court: You may. [382]

Q. (By Mr. Wakefield): Did you together with the assistance of Pete Wahl eventually recondition this shipment or segregate the good from the bad?

A. It was with Mr. Wahl that I came to the conclusion that there were a number of barrels that were in a badly damaged condition and there were others that were in a less damaged condition. Along with Mr. Wahl—who had had a lot of experience with herring—we discussed the condition of the herring. He was the one that took the herring out of the barrels for me and showed me.

The Court: With what result so far as reconditioning or salvaging or selling did you act on this herring?

The Witness: We didn't recondition the herring. It was put into cold storage and was later sold—that which could be sold. That which could not be sold was disposed of.

Q. (By Mr. Wakefield): That is, you mean that the barrels which were in your opinion in fit condi-

(Testimony of James C. Gow.)

tion or not, say, unfit for human consumption were placed in cold storage?

A. They were all placed in cold storage. That which had any value at all was placed in cold storage to be disposed [383] of later.

Q. Mr. Gow, did you take any temperatures of the contents of these barrels of herring?

A. No, sir.

Q. Did you know that temperatures had been taken?

A. I learned later that temperatures had been taken, yes, but not at the time I inspected it.

Q. At the time you made an inspection did you feel the barrels or put your hand in them?

A. Why, I had herring in my hands and also part of the brine when I picked up a herring.

Q. Was it hot? A. No, sir.

Q. These barrels that were opened for inspection on September 5th, how many such barrels approximately were opened?

A. Out of the shipment I would say those that we saw on the first day represented about two hundred barrels.

Q. There were that number of barrels opened?

A. Yes.

Q. Did you ascertain from what hold this herring had come on the Denali? A. Yes, sir.

Q. Did you go down into this hold? [384]

A. I went down into the hold the next day.

Q. What hold was it? A. Number 3.

Q. Did you make any inspection of number 3—this was the lower hold, was it?

(Testimony of James C. Gow.)

A. Yes; number 3 lower hold.

Mr. Hamlin: May we have that date fixed, please?

Q. (By Mr. Wakefield): You say this was the following day; that would be September 6th?

A. That is right.

Q. Did you make any inspection of number 3 lower hold at that time?

A. Yes, sir, we did.

Q. What was the purpose of making your inspection?

A. The purpose of the inspection was—seeing as the fish was in damaged condition and the statements were that the damage was alleged to be heat—I went aboard to see whether there were any conditions on the ship that I figured would be accountable for that heat.

Q. That is what you were looking for when you went into the hold? A. Yes, sir.

Q. What was the condition of the ship on September 6th, [385] when you went aboard?

A. The hold was empty. The hold was warm. I would say it was warmer than the outside temperature but not abnormally warm.

Q. What was the condition of the ship as to whether it was in a laid-up condition or in an operating condition?

A. The ship was in a laid-up condition. The strike was on. The ship was shut down.

Q. The ship was shut down at the time you were aboard? A. Yes, sir.

(Testimony of James C. Gow.)

Q. Did you have to use flashlights?

A. Used flashlights.

Q. Did you find anything, Mr. Gow, in number 3 lower hold that you could attribute to causing heat damage to barrels of herring?

A. No, I didn't. The bulkheads are not covered. The shaft alley bulkheads were not covered. They weren't warm or radiating heat at that time.

Q. Are there any steam pipes in the holds?

A. There are no steam pipes in the holds at all.

Q. What would you say, if you know, with respect to the forward end of number 3 lower hold—the forward bulkhead between the shaft alleys? Is that forward bulkhead the engine room bulkhead? [386]

A. No. The forward engine room bulkhead is about four feet forward of the shaft alley. There is a connecting passage way between the one shaft alley and the other. Beyond that is the engine room bulkhead.

Q. Mr. Gow, will you state your opinion as to whether or not number 3 lower hold on the Denali—assuming that it was in the condition you found it on September 6th, 1946, except that the vessel was operating rather than being shut up by the strike—whether that hold in your opinion is a proper hold for the carriage of salt herring from Alaska to Seattle on a voyage of ten or twelve days' duration in the summer time?

A. I would consider it a proper hold and I would pass it as such.

(Testimony of James C. Gow.)

Q. In your opinion, is either number 3 or number 4 hold on the Denali, as you found it on this occasion, a warm or a hot hold?

A. No, sir; I wouldn't call it a warm or a hot hold.

Q. Mr. Gow, what if you know is the effect of a lower hold, the fact that it is below the water line; what effect if any does that have upon the hold?

A. In lower hold stowage, the coldness of the water—the lower hold would be below the water; therefore [387] the cold water on the shell plating would have a cooling effect on the shell plating in the hold.

The Court: Does a cargo space below the water's level or elevation make a favorable stowage space for sweating cargo which sweats because it has heat?

The Witness: Lower hold stowage is all right, your Honor. Sweating of cargo, your Honor, is due to warm air striking a cold surface. Then you get condensation, like canned salmon. If the cans are cold when they are put in the ship and warm air strikes the cans, the warm air will condense. In the same way in a ship you get condensation from warm air striking the ship's cold plates. That is the reason you have to put sweat bands on to keep the cargo from coming actually in contact with the steel.

The Court: Many times you find cargo that has that sweating characteristic stowed in space below the water level, on touching the ship outside, do you not?

(Testimony of James C. Gow.)

The Witness: Yes, you do. You find it more in the case of the upper deck where you have an exposed weather deck and it gets cold and the sweat drops down on the cargo.

The Court: Wouldn't it be better to have that [388] sweating cargo stowed on some upper deck where you might ventilate it better from the outside air?

The Witness: You can ventilate the 'tween decks of the lower holds very well on a ship. But the sweating of cargo itself is something that causes a lot of damage because you have a large mass there, whereas sweat from the ship's side, you have battens and you have supplementary dunnage and you have matter in between the sweat battens which holds the cargo away from contact with metal surfaces, so you don't get as much damage to a commodity as you would from a drip overhead, above.

The Court: Just suppose for the sake of this question only, that this cargo of salt herring in barrels was actually warmer inside the barrels—in the midst of the contents of the barrels—when the cargo was placed on board in this hold space in number 3 and number 4 holds, than was the temperature in that space, and suppose that would have a tendency to continue some kind of a heat condition; suppose the warmth of the inside contents of air was such that the outside cooler air in the lower hold wouldn't have the effect of cooling it in time to avoid further deterioration, don't you

(Testimony of James C. Gow.)

think that space somewhere in the ship other than this would be available, where [389] the temperature and ventilation could have been more accurately controlled and applied, would have been better than putting this cargo where it was placed?

The Witness: I don't think so.

If the cargo was in good condition before it was shipped and cooled properly before it was shipped, I don't think that in a 10 or 12-day period that warm outside air or warm air in the hold could possibly affect the herring to damage it to the condition in which we found it when it came down here.

The Court: You may inquire.

Mr. Wakefield: I was going to ask the question of the witness that he just answered in explanation to your Honor's question.

Q. (By Mr. Wakefield): In that respect, Mr. Gow, the answer that you made immediately preceding, did you take into consideration the condition of the herring as you saw it at the time it was discharged here in Seattle? A. Yes.

Q. I understand it is your opinion that if this herring had been in proper condition and sufficiently cooled when loaded at Port Wakefield that the condition you [390] observed on September 5th could not have been produced during that 12-day voyage in the hold of the vessel, is that correct?

A. Yes, sir.

Q. What then, in your opinion, did cause the condition of the herring which you saw on September 5, 1946?

(Testimony of James C. Gow.)

Mr. Hamlin: That is objected to upon the ground that the witness is not properly qualified to draw a conclusion of that kind and can do no more than speculate.

The Court: You haven't asked any other expert that question, have you, Mr. Wakefield?

Mr. Wakefield: I believe not.

Mr. Hamlin: I asked that question and objection was sustained to it when Mr. Perry was on the stand.

The Court: It seems to me that a same or similar ruling should be made here. Whether or not Counsel is accurate in his recollection of what happened in the case of the witness Perry, that the Court ought to sustain this objection.

Mr. Wakefield: I would like to ask a similar question and see if that would not clear this up.

Q. (By Mr. Wakefield): Mr. Gow, in lieu of my last question, can you tell us from your own knowledge of [391] herring and its qualities and propensities what other possible causes there could have been which would have caused the condition you found in the herring on September 5th, 1946?

A. Well, the only other causes that I would know of or consider could happen would be that the fish had been caught and left too long before being packed and therefore had started to spoil before they were packed, or that they were improperly brined or cured in the curing process.

Q. Do you believe that assuming that four hundred barrels of the herring had been out in the

(Testimony of James C. Gow.)

open on the face of the dock at the saltery in the sunshine for five or six days would have any effect on it?

A. I believe it would have a very decided effect on it. Out in the sun the barrels become warm. If when herring is packed and cured it is cooled off and kept cool, and when it arrives down here in the ship, it is immediately taken out of the ship and put in a warehouse in refrigeration space or if it is going out by cars it is put in iced cars. Therefore, it is quite evident that the herring has to be protected to maintain its quality.

If it is left on an open dock prior to its shipment or left on an open dock after it has been discharged, [392] I think you would find that time and heat would cause it to be damaged.

Q. With respect to the items of damage, Mr. Gow, is it a fact that you did not approve without prejudice the various items of charges for the storage of the herring after it had been segregated?

A. Yes. I approved known charges to me which I felt were applicable to the damage but no charges which I felt would have been incurred irrespective of the damage.

Q. Could you tell us the items and the amounts thereof that you did approve without prejudice?

A. If I look at my report I can. The items I approved were "Wahl Brothers, Inspection and Segregation, in the amount of \$99."

Another bill of Wahl Brothers of inspection and segregation of \$54.

(Testimony of James C. Gow.)

Removing of the herring from cold storage to the warehouse for inspection and segregation, \$157.86. Return to cold storage, \$250.54. Labor and equipment for inspection, \$23.90, making a total of \$585.30.

Mr. Wakefield: What is the total of those items, Mr. Gow?

The Witness: \$585.30. [393]

Q. Now with respect to the balance of the items which I believe come to slightly in excess of \$1700, why did you not approve the balance of those items?

A. Well, on those items as I state in my report, "The storage charges on this report are not listed as an expense item as such items are only applicable as they are over and above the normal storage." So they had wharfage and storage charges incoming on which they normally would have had to pay and storage charges they normally would have had to pay. If a shipment was moving out immediately, why, it would naturally be affected one way or the other. If they were coming in and going to stay and then be stored for any length of time, why, there would have been normal storage on it, anyway.

Mr. Wakefield: I think that is all.

The Court: You may cross-examine.

Cross Examination

By Mr. Hamlin:

Q. Mr. Gow, have you ever sailed?

A. Yes.

(Testimony of James C. Gow.)

Q. When did you sail? [394]

A. I sailed in 1912, in 1914, and also prior to that in 1908. I was not a Master.

Q. In what capacity did you sail?

A. I sailed on deck—as a deck-hand.

Q. As a deck-hand? A. That is all.

Q. On each of those occasions?

A. Yes. On the first occasion I sailed with my father merely as a messboy.

Q. Was it just one trip on each of those years?

A. Just one trip.

Q. One trip each year? A. Yes.

Q. Have you ever followed an occupation which required you to use your discretion in the stowage of cargo—in the actual placing of cargo in a ship, that is what I mean?

A. Yes. I served an apprenticeship in the Gow corporation for five years.

Q. In that apprenticeship did you direct the loading of ships and decide where cargo should be placed?

A. Not in the five years of apprenticeship. I was with seniors who knew the stowage of cargo and I served my apprenticeship with them. The decisions were theirs until I served my apprenticeship. [395]

Q. That was your father, was it?

A. That is right.

Q. After this 5-year apprenticeship, was there any period at all when you actually had the decision of saying where cargo should be put in a ship?

(Testimony of James C. Gow.)

A. Yes.

Q. When?

A. Oh, after—that was '22—that would be 1927.

A number of our clients would ask a question of the firm as to whether it was good stowage to place cargo here or place cargo there, and what commodities could be put together.

Q. Have you ever had to make any such decisions about salted herring in barrels?

A. Yes. I have made decision on mild-cured salmon and herring, but that has been in the off-shore trade where it was put into refrigerator space.

Q. I see. It wasn't ordinary storage, then?

A. No.

Q. They just carry it in refrigerators in the off-shore trade? A. That is right.

Q. Why is that?

A. Because a mild-cured product of that type is not considered for a voyage of any duration as safe to [396] carry it; it will spoil.

Q. You are speaking, I take it, of voyages perhaps to the Orient?

A. Oh, voyages to Europe—they carry mild-cured salmon to Europe.

Q. You have told us about refrigerated cargoes, but have you ever been charged with direct responsibility for placing salted herring or mild salted herring or mild-cured salmon aboard a vessel without refrigeration? A. No.

Q. At whose request did you undertake to sur-

(Testimony of James C. Gow.)

vey this cargo of 1358 barrels of herring?

A. Alaska Steamship Company.

Q. Were you furnished with a report before you undertook your survey? A. Yes, sir.

Q. Were you advised that there had been a heat damage claim by the consignee?

A. No. I was advised that herring had come out of the number 3 hold or had been discharged and was said to be damaged and I went down and made the survey to find out the cause.

Q. When did you first learn that the claim was founded on excessive heat? [397]

A. September—excessive heat?

Q. Yes.

A. I don't think anybody told me it was excessive heat at all. I was called in on the 5th to go down to the ship. I went down with Mr. McClelland to find out what was the trouble. The herring was reported damaged, but at that time it hadn't been stated that it was excessive heat.

Q. Were you not furnished with the OS&D report which has been placed in evidence here as Respondent's Exhibit A-7 at that time? That is the receipt signed by Mr. Sharp, which indicates that the dock was claiming damages by heat.

A. No, I wasn't.

Q. Can you recall at all when the subject of heat first came up in your inspection of this cargo?

A. Yes. The heat came up when I was inspecting the herring with Mr. Wahl. Mr. Wahl made

(Testimony of James C. Gow.)

the declaration that the herring was damaged by heat.

Q. That was on the morning of September 5th, about 10:00 o'clock, was it not?

A. About then, yes.

Q. At that time the cargo had been on the dock how long?

A. It had been discharged on the 4th and it was out on [398] the 5th from the number 3.

Q. I believe the testimony so far has been that the discharge was finished close to midnight; is that your understanding of it?

A. That is right.

Q. So it had been on the dock about 10 hours?

A. Yes.

Q. You took no temperature readings of that herring?

A. No, sir.

Q. Did you take any temperature readings of either number 3 or number 4 lower hold?

A. No, sir.

Q. How does it happen that you took no temperature reading when you knew there was a claim that this merchandise had been damaged by heat?

A. For the reason that I didn't consider that the temperature in the holds, when I was in there, was any more than slightly warmer than the outside temperature. I just couldn't conceive that any heat like that would have any effect on the cargo.

Q. Wouldn't it have been, in your opinion, good surveying practice to check those accurately in a claim for damage by heat?

(Testimony of James C. Gow.)

A. It didn't occur to me at that time as being necessary.

Q. Did you make a written report covering your survey of [399] this cargo? A. Yes, sir.

Q. Do you have a copy of it with you?

A. Yes.

Mr. Hamlin: I will ask that it be marked, if the Court please.

The Court: Let it be marked with an appropriate exhibit number.

(Survey Report marked as Libelant's Exhibit 16 for identification.)

Q. (By Mr. Hamlin): Showing you what has been marked Libelant's Exhibit 16 for identification, I will ask you to tell us what it is, please.

A. Survey Report covering the shipment of herring on the Denali, Voyage 55, and stating the conditions and expressing an opinion as to the damage and the cause of the damage.

The Court: By whom was that report made?

The Witness: It was made by myself.

Q. (By Mr. Hamlin): Was it signed by you also?

A. Yes, sir—the corporation and myself.

Mr. Hamlin: I asked that this report be submitted in evidence. It is offered. [400]

The Court: At this time Libelant's Exhibit 16 is received in evidence.

(Libelant's Exhibit 16 received in evidence.)

The Court: Court will be in recess for about five minutes.

(Recess.)

(Testimony of James C. Gow.)

The Court: You may proceed.

Q. (By Mr. Hamlin): Mr. Gow, calling your attention to page 3 of your report which is Libellant's Exhibit 16, reading from the very top of it, "Survey was made subsequent to the discharge of the vessel and as damage is alleged to be due to spoilage as a result of heat a special survey of this space was made when the vessel had steam on her boilers, therefore, see Special Survey Report covering conditions in this compartment."

Do you have that special survey report covering conditions in this compartment?

A. No, I do not.

Q. Where is that report? [401]

A. That was made by our office at a later date than the time when the ship came in. It was made at a date after the ship had been under steam.

Q. You didn't make that observation, yourself?

A. No, sir.

Q. Did you base this report upon that additional document, however? A. No, sir.

Q. I notice farther on down on page 3 you have a table showing the sale and expense—well, the sale of the damaged herring and I read as follows, under the heading "Quantity of barrels. 110 quarter barrels declared sound, market value, \$13.00," and so on across, showing that \$32 was realized net.

"119 half barrels large, \$23 declared sound market value," and reading on across "Sold for \$168.00."

(Testimony of James C. Gow.)

“1129 half barrels medium, declared sound market value, \$21.00; sold for \$1,575.00, a total of 9,387—1129.”

Then there is the figure 79, referring apparently to half barrels of medium, sold for \$8.00, a total sale of six hundred thirty-two for those—making a gross amount received on the sale of \$10,329.00.

Now I ask you: Where did you obtain your information for the declared sound market values of \$13 for quarter barrels medium \$23 for half barrels large and \$21 for half barrels medium?

A. I inquired at the time of making the survey, purely with the purpose of determining what would be the dollars and cents value represented in the loss. I don't know whether I got it from Captain Perry or I got it from Mr. Wahl or anybody—what the price of herring was bringing in a sound condition at that time.

As far as going out—and then I checked those values with the Eardley Fish Company to find out what values were the prevailing values at the time. As far as my determining the value of the damaged cargo, that wasn't necessary in my case, because when the claim is filed with the steamship company, substantiating documents for those values would be furnished.

Q. But you did ascertain that those values of \$13 for quarter barrels medium \$23 for half barrels large, and \$21 for half barrels medium were the fair market values?

A. They were the generally prevailing prices that the herring would bring generally. One buyer

(Testimony of James C. Gow.)

might pay [403] more or less for the herring but that was the general values within the range that I determined.

Q. Was that the value at "X" dock?

A. Yes.

Q. Just how extensive was your examination of number 3 and number 4 lower holds as to conditions which might possibly cause heating?

A. I examined them, went into the compartments, and examined them thoroughly to see if there were any pipes or any conditions in those holds that would cause heat. I found no condition of heat other than that which you would expect to find in a ship when she was shut down, which would be higher than in a ship when she was opened up.

Q. Where did that heat come from that was generated when it was shut down?

A. The outside heat and the heat of a hold. When you close a place up, it will retain its warmth more than the steel of a ship's side or ship's decks. The inside of a room—like this room if you shut it up—it would be warmer in temperature than it would be with air circulating through it.

Q. Would you say that the walls of the compartment imparted their heat to the atmosphere within it and heated it up? [404]

A. No. The bulkheads weren't particularly warm. If there was any warmth in them at all from the shaft alleys as a result of closing down all of the ventilation, and she warmed up a little,

(Testimony of James C. Gow.)

that would have the effect of warming up the hold slightly on a shut-down ship.

Q. You mentioned that it was warmer than the outside air. I just wondered if you had found what causes it to be warmer.

A. Well, without any ventilation into the space it would be bound to be warmer.

Q. Of course, heat has to come from some source, doesn't it?

A. Yes. But generally a ship that previously had been alive and later on is buttoned up—whatever heat was in there would be retained. It was warmer than the outside temperature but not exceedingly warm.

Q. I think you mentioned the fact that this hold was below the water would cause it to be cooler, didn't you?

A. It would cool the plates but the question of whether there was sufficient coldness of those plates from the outside water temperature — it might not affect the hold too greatly. [405]

Q. Didn't you state that the fact that this hold in lower number 3 was below the water line in your opinion made it a cooler hold?

A. Oh, I think all holds that are below the water level would be cooler than a 'tween deck that is exposed to the rays of the sun. If a ship is painted black, for instance, you will get a radiation of heat from the shell plating and you will get a higher temperature than you will down below.

Q. Did you go into hold number 3?

(Testimony of James C. Gow.)

A. Yes.

Q. And that is the space you said was a little warmer than the outside air? A. Yes, sir.

Q. Did you enter the shaft alleys?

A. Yes, sir.

Q. How many steam pipes did you find in the shaft alleys?

A. One exhaust and two steam pipes. I believe if I recall right there was one that was five inches and the other was four inches.

Q. It is a little hard for me to hear you.

A. There are two steam pipes, one on the port and one on the starboard, that extend along the shaft alleys but those pipes are lagged. They are not exposed.

Q. They are not insulated at the joints, are they? [406] A. No.

Q. Did you find just one pipe? A. Yes.

Q. Isn't there a return to the pipe?

A. There is a 5-inch intake and a 4-inch outlet—return.

Q. The steam goes in through a 5-inch and comes back through a smaller return pipe?

A. As I recall it, yes.

Q. Do you know what apparatus that steam pipe fed?

A. No, because that was down at the time and I examined or felt the bulkheads. I don't know whether that goes back to the steering engine or just where it does go.

Q. As I understand you, there were two in each

(Testimony of James C. Gow.)

alleyway? A. As I recall it, yes.

Q. One for steam and one for the returning of condensed water. Does the water return in an insulated pipe, too?

A. Both pipes, as I recall, were insulated.

Q. When you made up this report were you under the assumption that there were just two pipes in each alleyway?

A. Yes. My report was based on the condition I found in the hold. It wasn't particularly an examination [407] of the alleyway but I knew those pipes were lagged and that being lagged they wouldn't radiate sufficient heat and then transmit it to the shaft alley to radiate heat into the hold.

Q. Do you recall where those pipes were located in the shaft alley?

A. Yes. They were in the shaft alley just underneath the round of the shaft alley over on the outside—well, they wouldn't be on the outside. They would be just about at the top of the round of the shaft alley.

Q. They were at the top of the round?

A. Yes, just below the surface of the shaft alley.

Q. How high is that shaft alley?

A. From the floor that you stand on I would say seven feet—seven and a half feet.

Q. Did you feel these pipes at the time you were down there to see if they did radiate heat—the steam pipes? A. Yes, sir.

Q. Did you feel them at the joints?

(Testimony of James C. Gow.)

A. Yes, sir.

Q. You were down there at what time of day?

A. I was down there on the morning of the 6th.

Q. The ship was dead then, was it not? [408]

A. That is right; they were dead.

Q. Did you find any other steam pipes down in lower number 3 except those in the shaft alleys?

A. No, sir.

Q. Did you pass through the passageway between the shaft alleys just ahead of the forward bulkhead of number 3?

A. Yes, sir.

Q. What is directly ahead of that passageway?

A. That would be the engine room bulkhead.

Q. Was any heat generated by that passageway?

A. I wouldn't say so, no. What heat there was would be carried away from the shaft alley by the escape hatch which is at the forward end of that compartment.

Q. Is the escape hatch kept open while the ship is sailing?

A. The escape hatch leads into the 'tween deck locker and then it also goes up to a ventilator. It is my understanding that that is left open at all times.

Q. I note on page 4 of your report that you mention "No efforts had been made to cover these barrels or to keep them cool by wetting them down with cold water although it is generally known that this commodity is subject to

(Testimony of James C. Gow.)

rapid deterioration if exposed to the sun for even a short period of time." [409]

Upon what did you base the statement that nothing had been done to cover the barrels or keep them cool?

A. That statement is based on statements made by officers on the ship that were there at the times of loading.

Q. You didn't talk to anybody that was at the plant for the last few days before the ship was loaded, did you? A. Did I what?

Q. Did you discuss the question of whether or not these barrels were wet down with anybody that was at the dock there at Port Wakefield for the last few days before?

A. No. I discussed with Mr. McClelland the question of what statements he had been able to receive from the Master or the mates or anybody aboard the ship regarding conditions at the point of loading. I wasn't there, therefore, I wouldn't be in a position to know. But if the Master or mate makes a statement then we surveyors use that statement as a means of a fact that has been determined at the point of loading.

Q. On page 7 of your report in the second paragraph, referring now to Libelant's Exhibit 16 again— [410] A. Which paragraph?

Q. The second paragraph. It is the first one which begins on that page, "From our examination of the herring on discharge and on investigation made it is our opinion that the compartments

(Testimony of James C. Gow.)

wherein these shipments of herring were stowed were suitable spaces for the carriage of this commodity if the commodity was in sound condition when shipped." I ask you, Mr. Gow, would your conclusion in that respect have been different if in making this report you had considered that there were other steam pipes in the alleyways with a total of approximately 9 to 10 inches of steam pipe space?

A. It wouldn't have affected my reasoning or my approval. Had I been asked to pass that compartment, I would have judged it not on the pipes that were in the alleyway. I would have judged it on what were the conditions of the hold itself or what heat you might get there and the conditions. I think number 3 hold would have been suitable space to stow cargo.

Q. Assuming that these pipes were on the side of the alleyway adjacent to cargo which was to be stowed between the alleyways, would that have changed your opinion any? A. No, sir. [411]

Q. You would have ignored, then, in your disposition of this matter, the presence of steam pipes behind a— A. Steam pipes are—

Q. —behind a steel covering of the alleyways right adjacent to the cargo, is that correct?

A. Yes. The steam pipes in that case are lagged and covered with an insulation and any heat that would would get coming from that steam pipe, with the air circulation that you would have through the alleyway through the shaft alleys, I think it

(Testimony of James C. Gow.)

would be very remote in my opinion that you would get any heat in that which would in turn transmit sufficient heat to damage a commodity of this kind.

Q. When you say "lagged", you mean insulated, don't you?

A. I mean it is covered with insulation, yes.

Q. In making that statement, you are considering that the joints of these steam pipes are not insulated, are you not?

A. That is right.

Q. You mentioned circulation. Did you mean in lower number 3 or in the shaft alleys themselves?

A. In the shaft alleys themselves.

Q. Are you taking into consideration any conditions of circulation within number 3 lower hold itself? [412]

A. No; not in connection with this commodity.

Q. Would over-stowing of the cargo of salt herring with cartons of salmon in your opinion affect the desirability or propriety of stowing salt herring between two shaft alleys?

A. No.

Q. Do you not feel that that would have any effect upon the herring in so far as—

A. No, I don't think in the case of salt herring packed in brine and stowed in that space, I don't think you are relying upon circulation of cold air between that commodity as you would with fish meal or other commodities that are known definitely to require the circulation of air.

Q. I have read before your statement that exposure to the sun for a very short period will

(Testimony of James C. Gow.)

cause rapid deterioration. That is what you said, wasn't it?

A. Yes. I would like—if I am permitted to mention the name of the gentleman who is deceased—I would like to bring out here that it was very forcibly pointed out to me by Mr. Wahl that if any barrels of herring were left out on the face of the dock for a short time in the heat of the sun, they would deteriorate. He certainly had a vast knowledge of herring. He was an expert as far as being able to [413] determine whether they were good or bad.

Q. He didn't tell you whether he meant with the head on or off, did he?

A. He said definitely that if they were stored out there with the heads on they would be that way.

Q. He was talking about Seattle, was he?

A. Yes.

Q. Have you ever had any experience with exposing herring to the sun in Alaska?

A. No, I never have had any experience with it. But I do know that Alaska weather is in many cases very comparable with Seattle.

Q. Have you ever been up there?

A. Yes, sir.

Q. To Port Wakefield? A. No, sir.

Q. Where have you been in Alaska?

A. Seward, Anchorage, Juneau, Cordova.

Q. Was it your observation that the sun shines at a greater or a less angle than it does down here in Seattle in August?

(Testimony of James C. Gow.)

A. Well, I don't know. I wouldn't be able to express an opinion on that. But I would say that the sun striking a barrel of herring would have a tendency to heat the barrel and it is not considered a good [414] practice; otherwise, they would store barrels of herring when they come down from Alaska—if they had them to store—they would put them out on the face of the dock when they are as crowded as they are.

Q. If you had known that the barrels of herring involved in this action had been covered with salt sacks and tarpaulins and wet down frequently every day that they were on the dock and were just uncovered a short time before the Denali arrived, would that have changed the conclusion which you have expressed in Exhibit 16?

A. It wouldn't have changed my opinion for the simple reason that I still don't think it is possible to pack herring in a brine, when the herring is in perfect condition, well cooled, and put them into a vessel with the same stowage as this had and bring it down to Seattle, that you can get sufficient warmth in that period of time to damage the herring. I don't think you can bring the brine up to a temperature that will cause the damage in that period of time.

Q. I notice on page 7 of your report, being Exhibit 16, you state in the fourth paragraph "Further, as it is general information that spoilage will take place rapidly if the barrels are left in the sun or in a [415] warm warehouse, it is our

(Testimony of James C. Gow.)

opinion that this shipment was not properly cared for by the shipper prior to shipment."

If you had known that this shipment was wet down and covered with salt racks and tarps, would you still have come to that conclusion?

A. I would still have thought that the herring would have arrived in a sound condition.

Q. That isn't my question. I mean, would you have come to this conclusion that you have expressed here, to wit: "It is our opinion that this shipment was not properly cared for by the shipper prior to shipment."

The Court: How much longer do you expect the cross examination to take reasonably from inquiring counsel's point of view?

Mr. Hamlin: I would think, your Honor, ten or fifteen minutes.

The Court: This case will be continued for further trial until tomorrow morning at 10:00 o'clock Court is adjourned until that time.

(At 5:00 o'clock, p.m., Thursday, July 15, 1948, Court proceedings adjourned until 10:00 a.m., July 16, 1948, in the United States Court House.) [416]

Seattle, Washington

July 16th, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: You may resume the taking of testimony in the case on trial. I believe Mr. Gow was on the stand and he may resume the stand for further examination at this time.

JAMES C. GOW

(Resumed)

Cross Examination—(Continuing)

By Mr. Hamlin:

Q. Mr. Gow, I believe at the close of yesterday's session you had stated in effect that even had you known that these barrels of salted herring were piled under cover of tarpaulin and salt sacks and wet down, that that would not in any way have affected the conclusion indicated in your report that stowage in the sun by the shipper was the possible cause of this loss; was that, in effect, [417] what you said?

A. No. In my statement—if the herring had been properly cooled down and been kept in a cool place under its original treatment I think the herring would have been in good condition. But I don't think any condition in the ship would have given the condition on out-turn that we found.

Q. Well, I notice on page 8 you say, "There are a number of conditions which could cause the conditions found—fish being held too long before packing due to congestion at the cannery, improper curing and preparation and the barrels being subjected to warm conditions." And you also say on page 7, "The wetting down of the Port Vita shipment clearly indicates the necessity of keeping this class of merchandise cool as the Port Vita shipment which was properly protected from exposure to the sun outturned undamaged and the Port Wakefield shipment which was not properly protected

(Testimony of James C. Gow.)

from exposure prior to shipment in the vessel out-turned damaged."

I just wondered if you had known that if these barrels were covered with tarps and salt sacks wet down whether you think this damage would have been attributed to piling them on the dock?

A. I don't think there would have been any damage because [418] if the herring was cold originally and was in good condition when it was put in the ship, I don't think there was any condition in the ship which could have contributed to or caused the damage.

Q. Then you assume that this herring had been piled out there without cover?

A. If it had been covered and all cooled down before it was put in the ship, I don't think we would have had any damage.

Q. That isn't my question. I say in preparing this report you were under the impression that it had been piled on the dock without being covered or wet down, hadn't you?

A. Yes; in my investigation that some of the herring had been on the dock without cover.

Q. So far as you were able to ascertain, that is what you thought had happened?

A. Yes, sir.

The Court: What was your source of information on that; was it from Mr. Wakefield?

The Witness: No, sir. It came from the records of the Alaska Steamship Company.

The Court: It came from the records of the Alaska Steamship Company.

(Testimony of James C. Gow.)

The Witness: Yes, sir. [419]

The Court: Did you consider any information on that point furnished by the libelant Apex Fish Company?

The Witness: No, sir.

Q. (By Mr. Hamlin): Then in preparing this report you had the understanding that it was so piled so what I am trying to get at is that if you instead had the understanding that it was wet down and under cover of tarps and salt sacks, would you have come to a different conclusion in your report?

A. When the herring was out-turned damaged, I would have still considered there was some other cause than any cause found in the ship because I would still have thought there was contributing causes.

Q. Would you have still thought that if the herring had been covered and wet down?

A. If the herring had been out-turned damaged, yes.

Q. You still feel that would be one of the causes. Did you consider, at the time you made the report, the direction of the compass that the Port Wakefield dock faces? A. No, sir.

Q. Did you know whether or not the barrels of salt herring were piled up against the walls of the warehouse or [420] out in the open away from any building?

A. I understood that some were outside on the open dock; and some were just in the entrance to the warehouse.

(Testimony of James C. Gow.)

Q. I say, as to those which were on the open dock, did you know whether they were against the wall or away out on the face?

A. I wasn't told that they were against the wall. I knew that the reports were that they were on the outside of the dock and exposed to the sun.

Q. You weren't informed, though, as to whether they were up against anything that might cast a shadow? A. No, sir.

Q. Did you know there was a warehouse building out on that dock?

A. I understood there was, yes.

Q. Did you know how high it was at the time these barrels were out there?

A. I don't know the height of it.

Q. Did you at the time you prepared this report? A. No, sir.

Q. Did you know how many barrels were piled on the dock at Port Wakefield?

A. I understood from the records it was approximately four hundred.

Q. Did you know whether they were tiered up or standing [421] singly without any being on top of one another? A. No, sir.

Q. If you had known at the time of making this report that the libelant's dock and the warehouse situated thereon faced approximately northeast that the barrels of salt herring concerned were piled in tiers of three or four or more high directly against the wall of the warehouse on the libelant's dock, that such warehouse building was ten to

(Testimony of James C. Gow.)

twelve feet high and that not more than 400 of the barrels were so piled on the dock, would you have then come to the same conclusion stated on pages 7 and 8 of your report?

A. If the herring was stored in a warehouse or stored in open space where the rays of the sun could get at the herring or that there was no cooling, I would still feel that that was a contributory cause of damage.

Q. No. I want you to just assume the facts that I recited in my question; don't assume other facts, please—just those that we have stated.

If you had that information which I outlined, would you still have felt that the causes of damage were those you have listed on pages 7 and 8, namely, improper storing, subjection to warm conditions, and putting them in the sun? [422]

A. Yes.

Q. You still would. Then how do you account for the 958 barrels that were in the warehouse being damaged, too?

A. I don't know when the herring was packed; I don't know what the condition on the inside of the warehouse was. It may have been a corrugated steel warehouse to reflect the sun. It might have been warm inside the warehouse. I wasn't there and didn't know those conditions. I did know some of it was outside from statements made in my investigation. However, from the statements of herring experts, where herring is stored in a warehouse and there are warm temperatures, in due time it will damage the herring.

(Testimony of James C. Gow.)

Q. At the time did you inform yourself of the amount of sunshine enjoyed by the Port Wakefield area during the period that the herring was being packed which, according to the testimony, was from July 24th to August 6th?

A. No, sir.

Q. Did you know at the time of making your report that the conditions as to sunshine during the month of July as indicated by the United States Weather Bureau showed that July, 1946 had only one clear day, twelve partly cloudy days, and eighteen wholly cloudy [423] days, while the month of August, 1946 had no clear days, eleven partly cloudy and twenty entirely cloudy, would that have changed your conclusion in any way?

A. No; because I believe that herring is packed and shipped down to Seattle and the minute it comes into Seattle it is put into cold storage for the reason they want to preserve the herring. I think herring stored after it arrives here or prior to its shipment that is left out for any period of time where warm weather or warmth could affect the herring—I think over a period of time it would damage the herring regardless of whether it was in the direct rays of the sun or not.

Q. What degree of heat is necessary to start spoilage in a barrel of herring?

A. That is something that I couldn't say without running a test on it.

Q. Did you know what the maximum temperature recorded in Port Wakefield, Alaska or that

(Testimony of James C. Gow.)

area was during the period indicated when you made up your report? A. No, sir.

Q. If you had known that the maximum temperature reported for the month of August, 1946, was 66 degrees, on the 23rd of August, would that have changed your findings [424] in any way?

A. No, sir.

Mr. Wakefield: Did you say 23rd, Counsel?

Mr. Hamlin: Yes.

Q. (By Mr. Hamlin): I meant in that question to convey to you the thought that that was the highest temperature recorded in the month of August. Did you have that in mind when you answered the question?

A. My answer would still be no.

Q. Were you aware of how herring was processed at the time you made this report?

A. Yes. I had knowledge of how it was processed.

Q. Are you familiar with the repacking feature in the putting up of salt herring of this type?

A. I had seen it done, yes.

Q. Did you have in mind, when you made your report, that a great many of these barrels were opened, inspected and repacked within the last few days of the time that the Denali arrived there on August 23rd? A. No, sir.

Q. You had forgotten about that when you made your report?

A. In that question, do you mean Port Wakefield?

(Testimony of James C. Gow.)

Q. Yes, sir.

Mr. Wakefield: That is an improper question. [425] I object to it as improper cross-examination. I don't recall any such evidence as that, your Honor. Besides, this is not proper cross-examination.

The Court: The libelant may contend that there was such testimony or that there may be such testimony before the case is brought to a close.

The objection is overruled.

(Last question repeated by the reporter.)

Mr. Wakefield: It is not shown that he knew about it or that anyone did.

The Court: Objection overruled.

A. No, I wasn't at Port Wakefield so I don't know.

Mr. Hamlin: I don't feel that that is an answer to the question.

The Court: Read the question and answer, Mr. Reporter.

(Last question and answer repeated by the reporter as follows:

“Question: You had forgotten about that when you made your report?

“Answer: In that question do you mean at Port Wakefield?

“Question: Yes, sir. [426]

“Answer: No, I wasn't at Port Wakefield, so I don't know.”)

The Court: The objection is overruled. Ask the witness another question.

(Testimony of James C. Gow.)

Q. (By Mr. Hamlin): On pages 5 and 6 of your report you make some reference to a number of prior voyages of the Denali and then again at page 7 you draw certain conclusions from those voyages in the third paragraph. The fact that herring had been carried on previous voyages and that the shipments had been out-turned in good condition and further that as highly perishable cargoes have been carried in these compartments for a longer period of transit, without sustaining damage, in our opinion, precludes stowage or handling on the part of the carrier, being the cause or contributing cause of this damage.

I ask you, therefore, if in coming to such conclusion, you also made investigation as to the prevailing outside temperatures during each of the voyages which you have listed—that is, the outside atmosphere? A. No, sir.

Mr. Wakefield: If the Court please, I would [427] like at this time to object to the last question and to the cross-examination generally. Counsel for Libelant has had admitted in evidence this Survey Report. The Respondent didn't put it in evidence. I submit it is his own evidence, and he has made the witness his own witness, and now he is impeaching evidence, which he himself put into the record. I think it is highly improper.

The Court: Objection is overruled.

Q. (By Mr. Hamlin): Did you make any investigation about the condition of the ventilating system on these other voyages? A. No, sir.

(Testimony of James C. Gow.)

Q. Did you make any investigation as to the presence or absence of other cargo in the holds on these voyages which might generate heat, or perhaps cause cold? A. No, sir.

Q. Or, an investigation as to the number of stops the vessel made, and the number of times the hatches were opened or closed during the voyage?

A. No. That wasn't necessary from my point of view. I investigated to find out whether or not the vessel had carried similar cargoes, or other cargoes which would perish if subjected to heat or improperly cared for, and my investigation disclosed that these cargoes had [428] been carried, and they had out-turned in a sound condition; therefore, there was no reason for me to go in and check back and find out if there was ventilation, when there was no damage.

Q. Do you happen to know the relative melting points of the fatty types of cargo which you have listed in your report, and the melting point of herring, oil—herring fat?

A. No, I wouldn't say that I knew it exactly, no sir.

Q. I notice also that you have referred to a tank top on the floor of the number 3 hold. There is a tank under number 3 lower hold, is there?

A. There is a tank—a double-bottomed tank.

Q. In number 4 hold, also?

A. Yes, also in number 4.

Q. How far does that go?

(Testimony of James C. Gow.)

A. The steel tank top has a ground over it of three inches, and the floor itself is 3x12, so you need a six inch space between the steel tank top and the wood ceiling, or wood floor.

Q. How deep is the tank?

A. The tank itself?

Q. Yes, sir.

A. I don't know the depth of the tank.

Q. Does it go down to the keel? [429]

A. It is a double-bottomed tank; yes, it would go down to the keel.

The Court: What is that tank used for?

The Witness: That is fuel oil, sir.

The Court: Fuel oil used in the development of power for the propulsion of that ship, is that right?

The Witness: Yes, sir.

Q. (By Mr. Hamlin): I would like to ask you, Mr. Gow, if you are aware of the Port of Seattle bills for storage? If you have a record before you—I want to run through the Port of Seattle bills.

A. I haven't my record with me.

The Court: You may use the one in evidence.

(The exhibit referred to handed to the witness.)

Q. (By Mr. Hamlin): Mr. Clerk, I wonder if you could furnish the witness with Exhibit 15, page four?

A. (Witness looking at a different document.)

Q. (By Mr. Hamlin): The top bill on Exhibit 15, which the Bailiff has just handed you is, I believe, Bill No. 97,647, extra wharfage and handling in cold storage, Port of Seattle.

(Testimony of James C. Gow.)

Is that right? A. I have the bill. [430]

Q. That bill has a figure of two hundred and some dollars doesn't it? A. \$256.12.

Q. Were you aware that that expense had been incurred?

A. Yes, when this herring came in, it would have a wharfage charge. And the labor furnished for handling and discharging through cold storage, dock alleyway is a movement of shipment on its arrival.

Q. Did you notice down in the lower left-hand corner of that bill, Exhibit 15, a computation subtracting certain amounts from the gross amount?

A. Yes. It shows Normal Wharfage Charge \$40.05, Handling at sixty cents, plus thirty per cent, \$62.48, making \$102.53.

Q. What is your reason for excluding the balance of that from allowance in this matter?

A. I dealt in my report, purely with the charges that I felt were applicable to the damage. There might be other charges that would apply thereto, but that would be something that would come under the Claim Department of the Alaska Steamship Company, as to whether it applied by reason of the damage, or whether it was a charge that didn't apply.

Q. Mr. Gow, I would ask you to assume that this cargo had been sold and accepted by the buyer, and was destined [431] to roll right over the dock into cars, and move out of Seattle. Assuming just

(Testimony of James C. Gow.)

that fact, would you please just leaf through those bills, and tell me if you still feel they should be disallowed?

A. There is an overtime charge here on the bill, No. 97648. I couldn't say now whether or not that overcharge was something by reason of the damage or not. In my report, I state the things that I know—the removing of the herring from the cold storage to warehouse, inspection, and segregation; that is something I know was caused by reason of the damage. These two items would have been in excess of normal handling charges.

These other charges, while I know that they are no doubt the charges, and apply to the herring, they are not anything that would really come under my jurisdiction to say whether or not they are a legitimate charge or not, other than if it is applicable to the damage and is submitted to me again, then it would be up to me to approve or disapprove of it.

Q. Do you remember whether or not you and Captain Perry consulted with reference to these bills before they were incurred?

A. Yes, we did.

Q. You think they really ought to have been incurred, [432] is that right?

A. I took out of the bills those items that I actually knew that I would consider applied to the damage. There may be others in there that do apply, but I would be assuming that.

Mr. Hamlin: That is all.

(Testimony of James C. Gow.)

The Court: Is there any further examination of the witness, on redirect?

Mr. Wakefield: Yes, your Honor.

Redirect Examination

By Mr. Wakefield:

Q. Mr. Gow, in connection with the mild cured herring, are you acquainted with the principal market for that product—where it is sold, I mean, principally?

A. As I understand, the herring is sold principally in the east. The buyers come out from the east, and inspect the herring and purchase it. It isn't necessary for all buyers, I guess, to come out. They sell it, probably, on wire or phone sales, but in a lot of instances, the buyers come out and inspect it.

Q. Does that market, if you know, have any effect on whether or not the herring is a mild cure or not?

A. I do know this—that there are buyers who buy [433] herring who prefer to have it a mild cure rather than a strong cure, because it is more easily freshened, and the lighter the cure, or the less salt, the easier the freshening of it, and if they could get it in a light cure, why, they would like it that way.

Q. Would you say an 85 per cent solution of brine was a mild cure? A. Yes, I would.

Q. Have you had experience with cures of other types of fish, such as salmon?

A. Yes, any mild cured salmon.

(Testimony of James C. Gow.)

Q. Do you know what percentage of brine is used in mild cured salmon? A. 100 per cent.

Q. Would it be your opinion, therefore, that 85 per cent solution is a mild cure?

A. Yes, sir.

Q. Mr. Gow, I am just wondering, in assuming the various factors that Mr. Hamlin asked you to assume, such as assuming that the herring was covered, and wetted down out on the dock, and that the temperature at Port Wakefield showed a maximum of sixty-six, and then further assuming that that herring, that he is asking you to assume is loaded aboard the Denali, and comes [434] to Seattle on this voyage, which, as it did, and was damaged to the extent that you saw it damaged when you inspected it on the fifth of September, is there any other cause or causes which could have produced that condition as you saw it there on September 5th?

A. I would like to have the question again.

(Last question repeated by the reporter.)

The Court: Any other cause other than what causes were stated?

Mr. Wakefield: Other than heat is what I am getting at.

A. Yes. As I stated before if the fish was not fresh at the time it was caught; if it had been held too long or if it hadn't been properly cured.

Q. (By Mr. Wakefield): How about the factor of being too mildly cured?

A. Well, too mildly cured; if it is too mildly

(Testimony of James C. Gow.)

cured, naturally, the fish deteriorates. The curing is what holds herring or holds salmon or any other product. If you want to hold it and not carry it in refrigeration and put enough salt with it, you can carry it with enough cure in ordinary storage [435] if you give it enough salt. The heavier the cure, the more the product will last.

Q. When does the cure take effect with respect to the packing of the fish in barrels?

A. After salmon or herring is packed, it is allowed to lay for about four or five days, as I understand it, to let that cure take hold—let the salt take hold. Then they open the bung of the barrel and take the brine solution, and they add one hundred per cent brine to it. And then when it comes out of the cold storage for shipment that brine is again checked and if the solution is below 100 per cent, they bring it up to 100 per cent. I am talking about salmon there. In herring they bring it up to 85 or 90 per cent.

Q. What I am talking about is whether or not in the curing of herring, the curing takes place at the outset, let's say the first five or six days that the barrel is packed and then becomes fixed or does the curing continue week after week?

A. I believe it becomes fixed. There may be some curing goes on after that, but as far as I understand it, within the first three or four days that the actual cure is taking place, then after that the brine holds the fish. The reason for increasing [436] the brine when you find the brine is

(Testimony of James C. Gow.)

down is by reason of the fact that the juice or the liquids of the fish come out and dilute the brine.

Q. And that is the purpose of rebrining?

A. Yes.

The Court: Did you interest yourself in the length of time that this shipment remained on the open dock, not under shelter, at Seattle, before you examined it?

The Witness: That it laid on the dock in Seattle, sir?

The Court: Yes—on the open dock exposed to sun and weather.

The Witness: It wasn't on the open dock. It went into the warehouse.

The Court: It went immediately into the warehouse when it was discharged, did it?

The Witness: Bell Street is a very small apron on the dock. It is closed dock from there on in.

The Court: Is it your information that these barrels of herring as they were discharged from the ship were stowed temporarily immediately under the shed of the warehouse?

The Witness: Yes, sir.

The Court: Do you recall what number were [437] discharged before the strike commenced on the 5th of September and how many of the barrels were discharged after the strike terminated on or about the 25th of September.

The Witness: Those in the number 3, your Honor, were discharged prior to the strike.

The Court: All of those in number 3?

(Testimony of James C. Gow.)

The Witness: Yes. Number 3 was discharged—

The Court: How many do you think?

The Witness: There was 971, I think. 971 half barrels from number 3 hold. Number 3 hold was discharged prior to the strike.

The Court: Were there any barrels discharged from number 4 hold?

The Witness: Not at that time. The number 4 was discharged later.

The Court: That is, after the strike?

The Witness: Yes, sir.

The Court: Is it your information that no barrels were discharged out of number 4 hold before the strike set in.

The Witness: Yes, sir.

The Court: That is all I wish to ask this witness.

You may inquire. [438]

Mr. Wakefield: I have no further questions.

Mr. Hamlin: I have no further questions.

The Court: You may be excused from the stand.

(Witness excused.)

The Court: Call the next witness.

Mr. Wakefield: If the Court please, the Respondent rests.

The Court: Is there any rebuttal testimony?

Mr. Hamlin: Yes, your Honor; very slight.

Captain Perry.

CAPTAIN L. E. PERRY,

recalled as a witness by and on behalf of the Libelant, having been previously sworn, was examined further and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Captain Perry, at the time that you were down in number 3 hold of the S.S. Denali on September 5, 1946, I ask you whether or not you made any inspection of [439] the alleyways—the shaft alleys in number 3 lower?

A. I made an inspection. Outside of the alleyways as you can see them from number 3.

(Report of Survey marked Libelant's Exhibit 17 for identification.)

Q. Did you enter inside the shaft alleys?

A. I did, but I had to go through the engine room.

Q. Did you see any steam pipes therein?

Mr. Wakefield: I object to this, if the court please, as not proper rebuttal.

The Court: Is it your contention that if admissible at all it should have been as a part of Libelant's case in chief?

Mr. Wakefield: Yes, your Honor. This witness was a witness in chief and said he was down there and inspected this hold and testified about it. We are not rebutting. That was a part of his direct examination.

The Court: Any response?

Mr. Hamlin: Yes, your Honor. He was not

(Testimony of Captain L. E. Perry.)

asked anything about steam pipes on the Libelant's case in chief because the libelant did not undertake to prove at that time any specific things about the generation of heat in the hold. [440]

The Court: What has happened in Respondent's case that causes you right now to do this when you didn't do it before?

Mr. Hamlin: Respondent has stated that this hold was a proper hold in which to carry salt herring, in an effort to rebut the presumption of negligence which arose upon the conclusion of the libelant's case. Whether or not they have done so—I am not making any comment about that—but it is nevertheless incumbent I feel upon the libelant to meet such proof and the respondent has introduced in support of its stand that it was not guilty of negligence.

The Court: Did the libelant in its questions ask any questions concerning steam pipes?

Mr. Hamlin: I do not believe it did, your Honor.

Mr. Wakefield: The witness testified to the taking of temperatures down in the hold on the afternoon of September 5, 1946—he and Mr. Kniseley together.

The Court: What witness was it and whose witness was it who testified concerning steam pipes and the joints and fittings; was there any such testimony by any witness before this?

Mr. Hamlin: Mr. Felton, a marine engineer of [441] respondent, and Mr. Gow was interrogated about the steam pipes.

(Testimony of Captain L. E. Perry.)

The Court: The objection is overruled. Read the question.

(Last question repeated by the reporter as follows:

“Question: Did you see any steam pipes therein?”

A. Yes, there were steam pipes in the shaft alleys which were on the port and starboard side of number 3 and number 4 hatches.

Q. (By Mr. Hamlin): Where were the steam pipes located within the shaft alleys, on which side and where?

A. They were on the inboard side of the lower part of the arc of the circle at the top is what I mean by that. They weren't directly up in the crown of the arc but they were on the inboard side towards where the cargo was stowed.

Q. Were the steam pipes insulated?

A. In part, yes.

Mr. Wakefield: I move that be stricken as not being responsive “in part”.

The Court: The motion is denied. [442]

Q. (By Mr. Hamlin): Will you explain that please, Captain?

A. They were insulated or lagged as we call it except at the joints and approximately two inches from the actual flanges. That is to allow for repairs in case of damage.

I further noticed that some of the joints were leaking while I was there. I also noted in the engine room that there was quite a stream of water

(Testimony of Captain L. E. Perry.)

coming from somewhere and the vessel was developing a port list—this was hot water as well—and when I completed my investigation, I called Mr. MacClelland to tell him that he had better get someone down there, that there was something leaking in the engine room; and he in turn asked me what the hell I was doing down there. I says, “Well”—

The Court: What date was this?

The Witness: September 5th, sir.

The Court: What hour of the day was that?

The Witness: This was—oh, it would be approximately 3:30 in the afternoon.

The Court: What time did the strike become effective on that day?

The Witness: Well, I believe that it was at midnight that they completed the discharge. [443]

The Court: Of the 5th?

The Witness: Well, the 4th midnight or the morning of the 5th.

The Court: When did the crew leave the ship, do you know, on the 5th?

The Witness: Not from my personal knowledge, no, sir.

The Court: Do you have any information about it?

The Witness: Just from the testimony that I heard that they finally got off at 10:30 in the morning.

The Court: And this water that you saw was in the afternoon following that hour previously mentioned?

(Testimony of Captain L. E. Perry.)

The Witness: On the same day in the afternoon.

The Court: You may inquire.

Q. (By Mr. Hamlin): Captain Perry, have you ever been required to exercise discretion with reference to the actual stowage of cargo in your experience? A. I have.

Q. In what capacity?

A. I was mate and master of vessels.

Q. Approximately how long were you engaged in such occupation? [444]

A. Well, I was third mate from 1921 to approximately '23 where I had charge of the foreward deck of the vessels. Then I became second mate where I had charge of the after deck of vessels, stowage—noting the stowage and reporting any poor stowage to the Chief Officer. Then I became Chief Officer where I had charge of the entire vessel, which—the main one carried about 12,000 tons of cargo.

Finally, I became Master of the same vessel. Later I came ashore and was appointed Surveyor of the Board of Marine Underwriters from which time I have still had the say of stowing, on the correction of improper stowage of cargo.

Q. Considering all of the factors which you have observed, will you please state your opinion of whether the stowage of the 1358 barrels of salt herring in suit herein in lower number 3 and number 4 holds of the Denali was proper stowage or improper stowage.

Mr. Wakefield: That is objected to, if the Court

(Testimony of Captain L. E. Perry.)

please, as not proper for the following reasons:

First, the witness has not been shown to be qualified to express an opinion as to the stowage of mild-cured salt herring; secondly, the question doesn't include in it any of the facts with respect to the character of the hold or the conditions of [445] stowage or the length of the voyage, or the degree of cure given to the fish, or the condition that it was received in. I think it can't aid us because this man never saw the fish or the hold, or the stowage until after the ship was shut down for six or eight hours, and the cargo was out of the hold. It is improper, and not qualified. It is an improper hypothetical question, also.

Mr. Hamlin: I think three of Respondent's witnesses have stated, in their opinion, this particular stowage was proper—the stevedoring foreman, and the stevedoring superintendent, and Mr. Gow. I feel it is incumbent upon the Libelant—he certainly has a right to rebutt such evidence.

The Court: The objection is overruled. He may answer the question.

(Last question repeated by the reporter.)

A. I would say it was very improper stowage, for the reason—

Mr. Wakefield: You have answered the question.

Mr. Hamlin: Would you state your reasons, why you feel it is.

A. Yes, in number three, the herring—

Mr. Wakefield: Pardon me, for interrupting. I just want to note the same objection. [446]

The Court: Overruled.

(Testimony of Captain L. E. Perry.)

A. In number 3, I learned from stevedores, and persons who had seen it, that the herring was stowed in between the shaft alleys, and that, in turn, was over-stowed with cases of canned salmon, which did not allow for any ventilation on the herring.

And with your heat— [447]

Mr. Wakefield: May I interrupt the witness? I don't know whether it is proper for me to do so, but I submit this is improper, because the only evidence in the case, your Honor, shows conclusively that the herring in number 3 hold was not over-stowed with anything. It has been so testified.

The Court: The Court being the trier of the fact, is charged with a recollection of what the testimony is, and the value of the testimony of this nature depends upon the accuracy of the constituent facts which form the basis of the consideration given by the witness, to the question, in his answer.

You may continue your answer.

A. (Continuing): The herring was over-stowed in number 3, with cases of canned salmon, which blocked any ventilation. Then, having it in between the alleys with steam pipes on either side, which had live steam running through them for the entire voyage, which ran back to the steering engine, plus the normal heat of the engine room, you have created a hot pocket, in between the alleys.

(Testimony of Captain L. E. Perry.)

In number four, from my personal observation, I noted the canned salmon was stowed over the herring in this manner, and it is logical to assume that the chief officer who was in charge stowed it the same way in number 3. [448]

In my opinion, the reason for the improper stowage is the covering of it with canned salmon which allowed no ventilation. The heat that it received, in my opinion, cooked the herring. There isn't a shadow of a doubt in my mind, that that is what happened.

Q. (By Mr. Hamlin): You have before you what has been marked Libelant's Exhibit 17 for identification? A. I have.

Q. Will you tell us what that is please?

A. That is a report, made by myself, on this subject.

The Court: When was the report made that you have referred to?

The Witness: On the survey, sir, it was made September 5, 1946. The actual report was written February 3, 1947, and subsequent dates after September 5th.

Q. (By Mr. Hamlin): From what records, if any, did you compile the report?

A. Well, from my own pencilled notes in my notebooks.

Q. When were those notes taken?

A. They were taken at the time we were making the survey, as we went along.

Q. To whom was this report rendered?

(Testimony of Captain L. E. Perry.)

A. It was made at the request of James Farrel & Co. [449]

Mr. Hamlin: I offer Libelant's Exhibit No. 17, in evidence.

Mr. Wakefield: That is objected to, if the Court please. It seems almost elementary that a survey report of this kind is not admissable. The witness is here. It is a self-serving declaration. It is hearsay. It is prejudicial and immaterial. Mr. Gow's Survey Report certainly was unadmissable, but I didn't offer it.

The Court: Lawyers of the eminence of both counsel on both sides of this case must have easy access to some highly persuasive authority as to whether or not the Certificate and Report of a Marine Surveyor is admissable in evidence. The Court is going to take a recess of ten minutes, and is going to charge counsel on both sides, with responsibility of producing authority on the question, one way or another.

(Recess.)

The Court: I ask the witness to resume the stand, and I will hear the counsel further, now, on the admissability of Libelant's Exhibit 17.

(Argument presented to the court by respective counsel for Libelant and Respondent.)

The Court: The Court will be just as frank in commenting upon the Court's own impressions on this matter, and original impressions, as I have been in my comments about how well informed the judges and admiralty lawyers ought to be on this question.

I am very frank to admit before counsel and others interested in this case, that I came to this Court as a judge of it, with the impression very distinct in my mind, growing out of what experience I had had as an admiralty lawyer, that usually the survey reports of marine surveyors were admissible in evidence as such. That is a very distinct impression in my mind as to the law relating to such subjects. I find now, by a review of this statement in Benedict, that it is a statement which the Court must receive as modifying my impression which I have just mentioned.

Libelant's Exhibit No. 17, Marine Surveyor's Report as to damage, was dated and apparently executed by the witness now on the stand, on the date of February 3, 1947. This witness' survey and inspection were made beginning on or about the 4th or 5th of September, 1946. That is approximately five months prior to the making and [451] executing of this survey and report, dated February 3, 1947. Such a document, made after such a long lapse of time, could not in any real sense be regarded as an integral part of the work done by him at the time of his inspection and survey. Too much time has elapsed to be a part, and a necessary part, of the duty performed by him, at the time he commenced and performed his inspection and survey.

Adverting now to Libelant's Exhibit No. 12, which is a report made by Peter A. Wahl, and received by this Court in evidence as Libelant's

Exhibit 12, that exhibit was received in evidence by the Court primarily upon the theory that it was a record made upon a business matter then being attended to by the witness making it, by virtue of a business assignment, respecting a material issue in this case, and the Court admitted in evidence that exhibit, Libelant's No. 12, primarily on the theory that it was a business record made at the time the business was done, or approximately about that time. The contents of the exhibit tend to throw some light upon a material issue in this case.

This Libelant's Exhibit No. 17, doesn't meet that test at all. [452]

In view of the statement in Benedict 3 Benedict, Adm., page 8, Sec. 381 b, which may impliedly suggest that the Courts are now inclined to limit the field for application of the rule expressed in the case (*The Mason*, 249 Fed. 718) relied upon by Mr. Hamlin admitting a marine surveyor's report, it would seem the Court should not admit in evidence this Libelant's Exhibit No. 17. As a matter of fact, I feel that it should not be admitted because of the great lapse of time between the doing of the survey, and the making of the survey report. That is primarily my own reason for excluding it.

The objection to the admission of it is sustained.

(Discussion off the record in re time for final arguments in the case.)

The Court: This case is set down for argument by counsel on the merits, on Thursday afternoon at 2:00 o'clock, the 22nd of July.

I ask counsel to file their briefs in this case, on the law, and any comments they may want to make on the facts, on or before Monday afternoon.

Counsel are excused, subject to those conditions.

(At 11:50 o'clock a.m., Friday, July 16, 1948, proceedings adjourned until 2:00 o'clock, p.m., July 22nd, 1948, in the United States Court House.) [454]

Seattle, Washington

July 22nd, 1948, 2:00 o'clock, p.m.

(All parties present as before.)

The Court: In the case of the Apex Fish Co., vs. the United States of America, Cause No. 15091, continued to this date for further proceedings, I wish to advise counsel that I have studied the briefs filed by counsel on both sides in this case, and I am now prepared to hear the oral argument on the merits.

I understand that it now remains for counsel to argue the case upon the merits, and for the Court to thereafter decide the case.

I will now hear Libelant's opening argument. You may address the court from your present stations.

(Final arguments presented to the court, by respective counsel for the Libelant and Respondent.) [455]

COURT'S DECISION

The Court: Much of the law which libelant has cited in support of the libelant's position in this case is applicable to cargo not concealed in sealed containers. In the case at bar the cargo of mild salt cured herring was contained in sealed barrels continuously from the beginning of the curing process in Alaska until the cargo was discharged from the ship at Seattle, except when each barrel was opened to check brine and add more herring to take up shrinkage.

The Court is not convinced from the evidence that any thorough inspection of the cargo was ever made from the time the herring was first put in the barrels until the cargo was discharged from the ship at Seattle, although the witness, Wakefield, in effect testified that the condition of the herring already in the barrels was always observed when they were checked for shrinkable and supplied with additional herring to fill up the shrinkage during the curing process, and that the herring in question was subjected to that check up.

The witness Wakefield, gave detailed testimony as to the history of this cargo and its care and conditioning. He testified as to the delivery from [456] the fishing boats of fresh herring at his saltery at Port Wakefield. He testified as to the culling out of bad fish and as to the care and attention given the fresh herring preparatory to subjecting it to the curing process. He testified to the care and attention given to the placing of the fresh herring in these barrels and of the introduc-

tion of brine and of the sealing of the barrels, and of the later opening of the barrels, draining off part of the brine and adding additional fish to take up the shrinkage. In effect he testified that the same care and grading of the herring in selecting sound and merchantable herring for the salt curing process were applied in this case as had been usually practiced at his saltery and that the same saltery process was applied to this shipment of herring, the same curing process, the same treatment of opening the barrels draining off part of the brine before the salt curing process was completed, and of adding more fresh herring to the barrels to take up the shrinkage, just as had been done in other salt curing processes at this plant, and that this salting process of this particular cargo was according to his usually practiced method.

There was no testimony to contradict that [457] testimony that the salt herring contained in these barrels, and the subject of this litigation, was the same kind of merchantable salt herring which this libelant had produced at the same saltery and shipped in other shipments at other times. There is no evidence to the contrary. Therefore, it seems to me that the Court must accept as true the testimony adduced by witness Wakefield as proof of the fact that this herring was, when it was received on board the ship at Port Wakefield, Alaska, as a matter of fact in apparent good order and condition.

It may be as contended by respondent that the

recitation in the bill of lading of "apparent good order and condition" should, in view of the fact that this cargo was in sealed containers, be applied as a matter of law only to the outward appearance of those containers rather than to the cargo contained in the containers. Accepting for the moment, for the purpose of considering the point, that such is the effect and the only effect of such recitation in the bill of lading, still the Court finds, concludes and decides from a preponderance of the evidence, here introduced as to the process I have already referred to, and as to the care and attention given to the curing process as shown uncontradicted by [458] all of the evidence upon that point in this case, that the condition of the contents of these barrels (and not merely the outward condition of the barrels themselves) was in fact in good order and condition when received on board this ship. There is nothing in the circumstance of storing some of the barrels containing some of the cargo on the face of libelant's dock at Port Wakefield for a few days awaiting the arrival of the ship which compels the inference that the contents of the barrels must have been damaged by reason merely of being stored for those few days on the face of that dock, in view of the favorable weather conditions for outside temporary storing of this kind of cargo at that season.

By a preponderance of the evidence it was further established that some of this cargo where it was stowed in the respondent's ship, either in number 3 lower hold or in number 4 lower hold

was, stowed in the space between the shaft alleys inside of which ran certain steam pipes, and that in that hold space there was an 80-degree Fahrenheit temperature 15 hours after the cargo had been discharged and only above five hours after a strike became effective and all hands left the ship. It may reasonably be inferred that the ship's machinery — [459] that which might produce heat in the hold as well as that which might cool the heat out of the hold—had been shut down at the time the strike became effective. However, it seems to the Court that the inference is compelling that there were an excessive temperature and heat in that cargo space at and before the time of the discharge of this cargo, and that such excessive temperature and heat caused the cargo damage here complained of. There was some oral testimony to the effect that while the unloading of the herring was in progress some heat about the shaft alleys was noticeable, although there was some oral testimony to the contrary.

The Court finds that at and before such time of discharge such temperature in the hold was excessive notwithstanding the fact that the respondent adduced testimony tending to show that inspections were made of the temperature in the hold at intervals during the voyage while the cargo was aboard respondent's ship and found no excessive temperature in the hold at the time the inspections were made, and notwithstanding other testimony that at another or other times so excessive heat was found by others of respondent's witnesses.

The Court also has considered the evidence now [460] before the Court in the form of Libelant's Exhibit 16 which establishes among other facts that other cargoes of this same character and cargoes of perishable and semi-perishable nature had previously been successfully carried in this cargo space, and further that on this same voyage cargo of this very same kind was successfully carried, without experiencing damage, from another Alaskan port, namely, Port Vita, to the same port of destination as that at which Libelant's cargo was discharged. But Libelant's Exhibit 16 discloses the fact that the Port Vita shipment was stowed not in numbers 3 or 4 holds but in number 1 lower hold.

The evidence does not affirmatively show in number 1 hold conditions different from those in numbers 3 and 4 respecting machinery or heating pipes or heat transmitting pipes which might cause any difference in temperature; but counsel for libelant has argued there were not, and the evidence does not indicate that there were, any heating pipes or steam pipes running through or along side or anywhere near that number 1 hold space, because it is forward of the engine room and not aft of the engine room.

As already indicated, the Court concludes that by a preponderance of the evidence it is established [461] that the contents of these barrels of salt cured herring were received on board this ship at Port Wakefield at the beginning of this voyage in good order and condition, and that, the libelant having

established that fact, the burden in this case shifted to respondent to prove by a preponderance of the evidence that nothing occurred in the course of the voyage which did actually damage or might reasonably have been expected to damage this shipment, or that that damage was caused by inherent vice of the contents of the barrels. This burden respondent has not sustained. Indeed, the preponderance of the evidence compels the Court to find and conclude that the damage to the contents of these barrels of salt cured herring resulted proximately from excessive heat in number 3 and 4 holds because of improper stowage and lack of care of the ship's cargo space, particularly holds 3 and 4, during the voyage and before discharge of the cargo on or before the 4th day of September, 1946, although the damage may have possibly increased in degree during the strike after that date, but, if so, the amount of such increase if any is not ascertainable from the evidence now before the Court.

For the reasons stated the Court does find, [462] conclude and decide this case in favor of the libelant and against the respondent for the difference in the market value of this cargo at Seattle, if it had there been in like condition as when shipped, and its actual condition in which it was when there discharged, plus the normal and necessary charges expended in connection with this shipment which would ordinarily have been experienced in connection with the normal movement of any other similar shipment under like circumstances in moving such a shipment at the Port of Seattle. As to those ex-

penses, if there are any further questions the Court will consider them upon the request of counsel.

(At 4:55 o'clock p.m., Thursday, July 22nd, 1948, proceedings concluded in the United States Court House.)

Concluded. [463]

CERTIFICATE

I, Merritt G. Dyer, Official Reporter for the United States District Court, hereby certify that as such official reporter I recorded the foregoing proceedings stenographically and the same have been reduced to typewriting under my personal supervision.

I further certify that all the foregoing record is a full, true and correct transcript of the proceedings occurring therein.

/s/ MERRITT G. DYER,

Official Court Reporter.

[Endorsed]: Filed Nov. 29, 1948. [464]

[Endorsed]: No. 12105. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Apex Fish Company, a corporation, Appellee. Apostles on Appeal. Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed December 2, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12105

THE UNITED STATES OF AMERICA,

Appellant.

and

APEX FISH COMPANY,

Appellee,

APPELLANT'S STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF PARTS
OF THE APOSTLES.

Comes now the appellant and herewith files in this Court its statement of points upon which appellant intends to rely on appeal, and designates the Apostles on Appeal necessary for the consideration and determination thereof pursuant to Rule 19(6) of the rules of this court as follows:

1. Appellant adopts its assignment of errors in this cause as heretofore filed with the United States District Court for the Western District of Washington in this cause in connection with the appeal and as included in the Apostles on Appeal, as the statement of points upon which appellant intends to rely on appeal.

2. Appellant designates all of the Apostles on Appeal, including therein all pleadings filed and testimony and exhibits admitted in evidence at the trial of this cause, as necessary for the considera-

tion and determination of said appeal and of the points relied upon by appellant on said appeal.

/s/ J. CHARLES DENNIS,
United States Attorney
/s/ BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Of Counsel.
Proctors for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 2, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER—OMITTING PRINTING OF EXHIBITS

Appellant and appellee having stipulated that the following exhibits be omitted from printing in the apostles on appeal due to the immateriality of some exhibits and due to the unprintable and cumbersome nature of all of said exhibits and that the original exhibits be used in lieu of printing the same, and that the substance and material facts of all of said exhibits otherwise appear in the transcript of the proceedings in this cause, now, therefore, good cause appearing; it is

Ordered that printing of the following exhibits in the apostles on appeal be omitted and that the said exhibits be used upon appeal in their original form, to-wit: Libelant's Exhibits Nos. 1, 2, 3, 4, 5,

6, 8, 9, 10, 14 and 15; Respondent's Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-6, A-7 and A-8.

/s/ WILLIAM DENMAN,
Judge of the United States Court of Appeals for
the Ninth Circuit.

Approved:

/s/ J. CHARLES DENNIS,
United States Attorney
/s/ BOGLE, BOGLE & GATES ,
/s/ CLAUDE E. WAKEFIELD,
Proctors for Appellant.
/s/ EDWARD M. HAY
and
/s/ DAVID A. HAMLIN,
Proctors for Appellee.

STIPULATION—OMITTING PRINTING OF EXHIBITS

It is stipulated by appellant and by appellee that the following exhibits admitted in evidence by the trial court at the trial of the above cause need not be printed or reproduced in the transcript of proceedings in the above cause and may be omitted from the printed apostles on appeal, and that said exhibits be used in their original form, to-wit:

Libelant's Exhibit No. 1. Article of Incorporation of Libelant;

Libelant's Exhibit No. 2. Minutes of Stockholders of Libelant;

Libelant's Exhibit No. 3. Certificate of Dissolution of Libelant.

That there is no issue in this cause or upon appeal to which the foregoing exhibits apply.

Libelant's Exhibit No. 4. Large chart;

Libelant's Exhibit No. 5: Large chart;

Libelant's Exhibit No. 6. Bill of lading;

Libelant's Exhibit No. 8. Photograph;

Libelant's Exhibit No. 9. Weather report;

Libelant's Exhibit No. 10. Weather report;

Libelant's Exhibit No. 14. Group of bills and invoices;

Libelant's Exhibit No. 15. Group of bills and invoices.

Respondent's Exhibit A-1—Log Book

Respondent's Exhibit A-2—Hatch list

Respondent's Exhibit A-3—Cargo Stowage Plan

Respondent's Exhibit A-4—Blue Print of Vessel

Respondent's Exhibit A-5—Hatch list (not admitted)

Respondent's Exhibit A-6—Letter and meteorological data

Respondent's Exhibit A-7—Cargo receipt

Respondent's Exhibit A-8—Hatch book.

That the foregoing exhibits are not of a printable nature and their inclusion in the printed record

would be cumbersome and impractical, and that the substance or material portions of most of said exhibits appear in the record and the material facts established by said exhibits appear otherwise in the testimony of the witnesses and in the transcript of the proceedings generally.

/s/ J. CHARLES DENNIS,

United States Attorney

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

Of Counsel.

Proctors for Appellant.

/s/ EDWARD M. HAY

and

/s/ DAVID A. HAMLIN,

Proctors for Appellee.

[Endorsed]: Filed December 2, 1948. Paul P. O'Brien, Clerk.

